Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-250
No. ———

In the Supreme Court of the United States

OCTOBER TERM, 1987

MANUEL L. REAL, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Petitioner,

v.

STEPHEN YAGMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH A. BALL
BALL, HUNT, HART, BROWN & BAERWITZ
211 East Ocean Boulevard
Long Beach, CA 90802
(213) 435-5631

DONALD C. SMALTZ
(Counsel of Record)
LEIGHTON M. ANDERSON
PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90017
(213) 612-2500

Attorneys for Petitioner Manuel L. Real, Chief Judge, United States District Court for the Central District of California

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether an appellate panel has power on remand to reassign a case to a different trial judge in the absence of grounds to disqualify the judge under 28 U.S.C. §§ 144 or 455.

2. Whether the appellate panel had the power to reassign this case to a different judge to advance the panel's conception of the "appearance of justice," when the panel had expressly found that petitioner had acted and would act fairly in the matter.

PARTIES IN THE COURT OF APPEALS

In addition to the parties named in the caption, the parties in the court of appeals included the plaintiffs and defendants in the underlying action, Jerry Brown and Gerry Fleischer, plaintiffs, and Dr. Sidney Weinberg and Dr. Michael Baden, defendants. Yagman & Yagman, P.C., respondent's law firm, was a party to the initial appeal from the award of sanctions against plaintiffs' counsel.

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES IN THE COURT OF APPEALS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
I. THIS PETITION PRESENTS IMPORTANT QUESTIONS CONCERNING FEDERAL COURT ADMINISTRATION AS TO WHICH THERE IS NO CLEAR RULE	7
II. THE COURT OF APPEALS DID NOT HAVE ANY EXPRESS OR IMPLIED POWER TO ORDER A REASSIGNMENT UNDER THE CIRCUMSTANCES OF THIS CASE	11
III. THE EXERCISE OF REASSIGNMENT POWER IN THIS CASE WAS CONTRARY TO THE EXPRESS FINDINGS REGARDING JUDGE REAL'S FAIRNESS AND IMPARTIALITY	15
CONCLUSION	16
APPENDIX A	1a
APPENDIX B	5a

TABLE OF CONTENTS—Continued

	Page
APPENDIX C	7a
APPENDIX D	8a
APPENDIX E	10a
APPENDIX F	12a
APPENDIX G	56a
APPENDIX H	58a
APPENDIX I	60a
APPENDIX J	75a
APPENDIX K	78a

TABLE OF AUTHORITIES

Cases: Page

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953) 13
Bercheny v. Johnson, 633 F.2d 473 (6th Cir. 1980) 10
Blunt v. United States, 244 F.2d 355 (D.C. Cir. 1957) 9
Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954), *rev'd*, 348 U.S. 961 (1955) 9
Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970) 12
Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983) 13
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 14
Cord v. Smith, 338 F.2d 516 (9th Cir. 1964) 9
Crandell v. United States, 703 F.2d 74 (4th Cir. 1983) 9, 10
Crawford Fitting Co. v. J.T. Gibbons, Inc., —— U.S. ——, 107 S. Ct. 2494 (1987) 14
Fleming v. Gulf Oil Corp., 547 F.2d 908 (10th Cir. 1977) 9
Koller By and Through Koller v. Richardson-Merrell, Inc., 737 F.2d 1038 (D.C. Cir. 1984), *vacated and remanded sub nom.* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) 11, 14
Lewis v. Curtis, 671 F.2d 779 (3d Cir. 1982) 10
Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962) (*en banc*) 9
Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 12
Petersen Mfg. Co. v. Central Purchasing, Inc., 740 F.2d 1541 (Fed. Cir. 1984) 8
Santiago v. Garcia, 821 F.2d 822 (1st Cir. 1987) 9
SCA Services v. Morgan, 557 F.2d 110 (7th Cir. 1977) 13
Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804 (9th Cir.), *cert. denied*, 375 U.S. 821 (1963) 8

TABLE OF AUTHORITIES—Continued

	Page
United States v. Alverson, 666 F.2d 341 (9th Cir. 1982)	10
United States v. Arnett, 628 F.2d 1162 (9th Cir. 1979)	10
United States v. Baylin, 696 F.2d 1030 (3d Cir. 1982)	8
United States v. Columbia Broadcasting System, Inc., 497 F.2d 107 (5th Cir. 1974)	8, 10
United States v. Greenough, 782 F.2d 1556 (11th Cir. 1986)	13
United States v. Ritter, 273 F.2d 30 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960)	8
United States v. Robin, 553 F.2d 8 (2d Cir. 1977) (*per curiam* on denial of rehearing *en banc*)	9
United States v. Sears, Roebuck & Co., Inc., 785 F.2d 777 (9th Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 580 (1986), *mandamus denied sub nom.* In re Manuel L. Real, —— U.S. ——, 107 S. Ct. 604 (1986)	6, 9
Will v. United States, 389 U.S. 90 (1967)	13
Statutes:	
28 U.S.C. § 137	2, 11
28 U.S.C. § 144	2, 8, 10, 11, 12, 14
28 U.S.C. § 332	2, 12
28 U.S.C. § 372	2, 12
28 U.S.C. § 455	2, 4, 7, 8, 10-14
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1651(a)	2, 8, 13, 14
28 U.S.C. § 1927	3
28 U.S.C. § 2106	2, 8, 9, 13, 14
Rules:	
Fed. R. Civ. P. 11	3, 4
Fed. R. Civ. P. 83	11
Rules of the United States Court of Appeals for the Seventh Circuit, Rule 18	10
Rules of the United States District Court for the Central District of California, Rule 27.1	3

TABLE OF AUTHORITIES—Continued

Other: Page

U.S. CONST. art. II, § 4 ..... 2, 12

American Bar Association, *Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts* § 3.11 (1977) 14

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. ———

MANUEL L. REAL, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Petitioner,

v.

STEPHEN YAGMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Manuel L. Real, Chief Judge, United States District Court for the Central District of California, through his undersigned counsel, petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit directing that a civil case be reassigned from petitioner to another district judge. Alternatively, petitioner seeks a writ of mandamus or prohibition directing the court of appeals to reverse its order of reassignment.

OPINIONS BELOW

The order of the court of appeals (App. A) granting respondent's petition for a writ of mandamus is reported

at 815 F.2d 575. The order of the court of appeals denying rehearing (App. B) is not yet reported. The district court's order to show cause (App. D) is not reported.

An earlier, related opinion of the court of appeals (App. F) is reported at 796 F.2d 1165. The court's order denying rehearing (App. H) is reported at 803 F.2d 1085. The district court's opinion awarding sanctions against respondent (App. I) and its order granting a directed verdict against respondent's clients (App. J) are not reported.

JURISDICTION

The order of the court of appeals granting respondent's petition for a writ of mandamus was entered on April 22, 1987 (App. A). A petition for rehearing was denied on June 26, 1987 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) or, in the alternative, 28 J.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, Section 4 of the United States Constitution and 28 U.S.C. §§ 137, 144, 332, 372, 455, 1651(a), and 2106 are reprinted in Appendix K.

STATEMENT OF THE CASE

This petition concerns an appellate panel's order to reassign a civil action, so that further proceedings regarding monetary sanctions against respondent ("Yagman") would be heard not by petitioner ("Judge Real"), but by another judge of the district court. The matter came before the appellate panel after a directed verdict for defendants in a defamation action filed by police officers employed by the City of Signal Hill, California. The defendants were Drs. Sidney Weinberg and Michael Baden, who are medical examiners employed by Suffolk

County, New York. Yagman was the plaintiffs' attorney in the action.

The case arose out of the death of a college football player, Reginald Ronell Settles, who died while in the custody of the Signal Hill police department. (App. 13a). After the Los Angeles County Coroner found the cause of death to be suicidal hanging, the Settles family requested a re-autopsy by independent medical examiners in connection with civil litigation in the district court, entitled *Settles v. City of Signal Hill.* After discussing their findings at a meeting with various counsel, including Yagman, the independent examiners, Drs. Weinberg and Baden, held a joint press conference with the medical examiners from the County of Los Angeles and the City of Signal Hill. Each doctor expressed his individual opinion at the conference, including Dr. Baden's opinion that the evidence was "atypical for suicidal hanging," and that death by chokehold was more likely than suicidal hanging, "51 percent versus 49 percent." (App. 13a-15a).

Thereafter, police officer Jerry Brown and police cadet Gerry Fleischer brought a diversity action for defamation against the Suffolk County doctors. Neither of the officers had been mentioned by name in the news conference. At the close of plaintiffs' case, Judge Real granted a directed verdict based on the plaintiffs' failure to show that they had been defamed or had suffered any damages, and their failure to present evidence of defendants' malice as required under state and federal law. (App. 75a-77a).

Judge Real also advised defendants' counsel that he would entertain a motion for sanctions under 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and the district court's Local Rule 27.1. In their motion, defendants sought an award of $250,000, although their attorneys' fees were in excess of $293,000. Granting the motion as to Yagman and his law firm (App. 60a-74a), Judge Real made extensive findings, including that Yagman filed the lawsuit against

Doctors Baden and Weinberg with "minimal or non-existent" knowledge of the facts and that Yagman prosecuted the case to silence expert witnesses and to obtain improper discovery advantages in the *Settles* civil action. Judge Real further found that Yagman had engaged in vexatious conduct throughout the entire proceeding. (App. 61a-62a).

Plaintiffs appealed the directed verdict. Yagman and his law firm, Yagman & Yagman, P.C., appealed the award of sanctions.

On the police officers' appeal, the issues expressly included numerous claims of judicial bias, prejudice, and unfairness. (App. 30a-38a). However, the appellate panel declined to give any credence to those claims. The court expressly rejected speculation that Judge Real's impartiality might have been affected by Yagman's announced intention to testify against the confirmation of California Chief Justice Malcolm Lucas. (App. 36a-37a). The panel also held that Judge Real's rulings were neither arbitrary nor one-sided, and that the questions he addressed to witnesses were "obvious efforts to clarify relevant testimony." (App. 35a-36a). Expressly denying claims of judicial bias "under the standards of 28 U.S.C. § 455," the court held that the plaintiffs had "fairly received their day in court" and affirmed the directed verdict in favor of defendants. (App. 33a-36a).

Reversing the award of monetary sanctions, the panel found that the filing of the complaint was not improper under Rule 11, and that sanctions for discovery abuses could not be imposed under the local rule relied on by Judge Real. (App. 49a-54a). On the subject of sanctions for Yagman's trial misconduct, the panel observed:

> [T]he district court did not point to specific rules which Yagman violated during the course of the trial. Rather, the court is critical of Yagman's tactical decisions, lack of preparation, groundless objections, and incessant quibbling. After reviewing the

> record, we sympathize with the court's reaction to Yagman's trial conduct but, under the circumstances, we must regard it as merely the last straw, following a pre-trial history of offensive and obstreperous conduct.

(App. 53a-54a). The court of appeals remanded for further consideration of what sanctions might be appropriate for Yagman's misconduct during the trial. (App. 54a).

Yagman's allegations of judicial bias, none of which were ever raised in the trial court, were separately considered on his appeal from the sanctions award. The panel expressly concluded that there was not the type of "personal embroilment or derogatory attacks leveled at Judge Real" that might require disqualification as a matter of due process. (App. 40a). The panel further rejected the contention that Judge Real should have disqualified himself under Section 455. (App. 40a-41a). While finding it "obvious" that Yagman and Judge Real "clashed" over evidentiary objections and rulings, the panel said, "we find none of it remarkable enough to indicate a need for Judge Real to disqualify himself . . . ." (App. 41a). The panel concluded, "We cannot find, on this record, reasonable grounds to question the impartiality of Judge Real in presiding over the issue of sanctions in this case." (App. 41a).

Despite the numerous findings that Judge Real had done everything necessary to afford a fair trial and an impartial decision, the panel granted Yagman's request that further proceedings be heard before a different judge. (App. 54a-55a). The panel's entire explanation for its reassignment order is set forth in a single paragraph at the end of the opinion, as follows:

> Yagman has requested that the action be remanded to a different district judge. This type of relief is exceedingly rare. "In the absence of proof of per-

> sonal bias, we remand to a new judge only under 'unusual circumstances.'" *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 780 (9th Cir. 1986) (citations omitted). *We have firmly rejected Yagman's claims of judicial bias* and, thus, are hesitant to grant this extraordinary relief. *We do not doubt Judge Real's ability to act fairly.* We grant this relief, however, because we believe it is necessary to preserve the appearance of justice. This case has had an unbecoming quality from its beginning. We do not appreciate nor condone the attorney bickering and misconduct which has pervaded the action and which spawned the district court's ire. Nevertheless, the massive sanction award and the numerous allegations of bias and overreaching have combined with this poor lawyering to produce an entirely unfortunate end result: the fragile appearance of justice has taken a beating. It is time to conclude the matter as quickly and as painlessly as possible. We feel this can best be accomplished by a new, randomly selected judge. Because the question on remand is limited, any duplication of effort and waste will be minimal.

(App. 54a-55a) (emphasis added).

On January 12, 1987, Judge Real issued an Order to Show Cause by which he requested briefs concerning the panel's authority to reassign the case. (App. 8a-9a). Rather than respond, Yagman filed an appeal from the Order to Show Cause, which the panel construed as a petition for a writ of mandamus. (App. 10a-11a). The panel invited Judge Real's response, stating that it would be "assisted in its consideration of the petition by the filing of responses." (App. 11a).

Pursuant to that invitation, Judge Real's response presented the question of whether an appellate reassignment power exists as a matter of constitutional or statutory law. The response observed that there is a comprehensive constitutional and statutory scheme relating to the assignment of cases and the removal of judges, vest-

ing power in Congress, the judicial councils, and the district courts themselves. The response further observed, however, that there is no express statutory removal or reassignment power vested in circuit court panels, except on a basis provided under the disqualification statutes. Judge Real also argued that reassignments are becoming increasingly standardless, are causing injury to the public's perception of the federal judiciary, and can not properly be ordered in the face of express findings that the district judge was not biased and not subject to disqualification under 28 U.S.C. Section 455.

The opinion below declined to consider such issues, and chastised Judge Real for attempting to raise them. (App. 1a-4a). Saying only that the reassignment power rested on "a long line of cases," the panel took the view that, as a district court judge, Judge Real was not entitled to raise any issue concerning the appellate court's order, even to the extent it was alleged to invade the district court's constitutional and statutory prerogatives. (App. 3a-4a). The opinion did not address how such issues will ever be presented for decision, if district judges are prohibited from raising them in response to an express invitation.

On July 14, 1987, the court of appeals granted a stay of the panel's mandate under Fed. R. App. P. 41(b), pending final disposition in this Court. (App. 7a).

REASONS FOR GRANTING THE PETITION

I. THIS PETITION PRESENTS IMPORTANT QUESTIONS CONCERNING FEDERAL COURT ADMINISTRATION AS TO WHICH THERE IS NO CLEAR RULE

This petition presents the question of whether a circuit court panel may order a case transferred from the assigned district judge solely on the basis that, in the panel's view, the transfer will promote the appearance

of justice. Petitioner's position is that the appellate power of reassignment should be considered together with the disqualification statutes, so that reassignment would be ordered only where there are specific reasons to question the judge's impartiality. This is an issue of considerable importance to the trial courts and the administration of justice in the federal systems, warranting the intervention of this Court. As the reported opinions demonstrate, the number of reassignments required by appellate panels has grown rapidly in recent years, underscoring the need for review by this Court. The need for this Court's intervention also appears from the obvious uncertainty among the circuit courts concerning the source and origin of their reassignment power and from the wide variations in the standards under which the power is believed to be validly exercised.

In terms of the source and origin of the power, a power of reassignment apart from circumstances justifying disqualification under Title 28 U.S.C. Sections 144 and 455 has been variously declared to reside in the appellate courts' general remand authority under 28 U.S.C. Section 2106, *see, e.g., Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 811 (9th Cir.), *cert. denied*, 375 U.S. 821 (1963), or in the All Writs Act, 28 U.S.C. Section 1651(a), *see, e.g., United States v. Ritter*, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960). Alternatively, it has been suggested that the power is implied, inherent, or supervisory in nature. *See, e.g., United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109-10 (5th Cir. 1974); *United States v. Baylin*, 696 F.2d 1030, 1043 n.30 (3d Cir. 1982). Although the Federal Circuit has said that its lack of supervisory authority deprives it of a reassignment power, *Petersen Mfg. Co. v. Central Purchasing, Inc.*, 740 F.2d 1541, 1542 (Fed. Cir. 1984), the Ninth Circuit has recently decided that reassignments are allowed under both Section 1651(a) and Section 2106, "as well

as the court's inherent authority." *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 779 (9th Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 93 (1986).[1]

Other reassignment cases rely on this Court's *per curiam* opinion in *Calvaresi v. United States*, 348 U.S. 961 (1955), *see, e.g., Naples v. United States*, 307 F.2d 618, 631 n.43 (D.C. Cir. 1962) (*en banc*); *Blunt v. United States*, 244 F.2d 355, 368 n.30 (D.C. Cir. 1957), although *Calvaresi* clearly involved a basis for disqualification under Section 144. *See Calvaresi v. United States*, 216 F.2d 891, 900 (10th Cir. 1954), *rev'd*, 348 U.S. 961 (1955). In still other instances, reassignments have simply been issued without any citation of statutory or other authority. *See, e.g., Crandell v. United States*, 703 F.2d 74, 78 (4th Cir. 1983); *Fleming v. Gulf Oil Corp.*, 547 F.2d 908, 914 (10th Cir. 1977); *Cord v. Smith*, 338 F.2d 516, 526 (9th Cir. 1964).

The standards on which reassignments should be based are also in disarray among the circuits. In *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (*per curiam*, on denial of rehearing *en banc*), the Second Circuit announced that it would consider three factors in the exercise of the court's perceived reassignment power under Section 2106. Under these factors, the court would consider whether the judge would have difficulty excluding inadmissible evidence or erroneous views from further deliberations, whether reassignment is advisable to preserve the appearance of justice, and whether reassignment would entail disproportionate waste and duplication of effort. *Id.*

The three factors promulgated in *Robin* have been expressly followed in the First Circuit, *Santiago v. Garcia*, 821 F.2d 822 (1st Cir. 1987), the Sixth Circuit,

---

[1] This Court denied Judge Real's mandamus petition, filed with respect to the reassignment order in the *Sears* case. *In re Manuel L. Real*, 107 S. Ct. 604 (1986).

Bercheny v. Johnson, 633 F.2d 473, 476-77 (6th Cir. 1980), and the Ninth Circuit, *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979). However, some more recent Ninth Circuit cases take the position that the "appearance of justice" factor is the *sole* factor needed to support reassignment. *See, e.g., United States v. Alverson*, 666 F.2d 341, 349 (9th Cir. 1982). Indeed, this very case vividly illustrates the opinion of some Ninth Circuit panels that a reassignment may be ordered solely to promote the panel's individualized sense of the appearance of justice, without any other consideration.

Other circuits have cited such standards as whether the judge has an apparent predisposition in the case, *Crandell v. United States*, 703 F.2d 74, 78 (4th Cir. 1983), or whether reassignment will protect "the integrity and dignity of the judicial process," *United States v. Columbia Broadcasting System*, 497 F.2d 107, 109 (5th Cir. 1974), or even whether reassignment will serve the appearance of justice, "[w]ithout pausing to consider whether there is a basis for legal disqualification." *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982). The Seventh Circuit's approach has been to adopt a rule that all cases remanded for new trial will be reassigned unless otherwise directed, and other cases may be reassigned at the request of the parties or by order of the court. Rules of the United States Court of Appeals for the Seventh Circuit, Rule 18. No guidance for such determinations is provided by the rule. *Id.*

By contrast, the disqualification standard under Section 144 is whether the moving party has shown, by affidavit, a personal bias or prejudice on the part of the district judge. The more flexible standard under Section 455(a) is whether the judge's impartiality "might reasonably be questioned." The trend to imply a reassignment power from sources other than Sections 144 and 455 has been recognized as encouraging "judge shopping" without regard for the specific standards for recusal

mandated by Congress. *Koller By and Through Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1068-69 (D.C. Cir. 1984) (Richey, J., concurring), *vacated and remanded sub nom. Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 105 S. Ct. 2757 (1985).

Since federal judges are not fungible commodities, the apparent confusion concerning both the source of any reassignment power and the standards for its exercise is a matter of vital concern to the administration of justice in the federal system. With each circuit going its own way, the need for clarification by this Court is evident.

II. THE COURT OF APPEALS DID NOT HAVE ANY EXPRESS OR IMPLIED POWER TO ORDER A REASSIGNMENT UNDER THE CIRCUMSTANCES OF THIS CASE

The reassignment order improperly interdicted established procedures for the assignment of cases and the disqualification of judges. While expressly providing remedies for bias, misconduct, or neglect of duty by federal judges, neither the Constitution nor Congress has seen fit to provide a means by which an appellate panel may replace a district judge in a pending case, except under the circumstances and procedures set forth in 28 U.S.C. §§ 144 and 455. While the courts have significant latitude to disqualify a judge in a case in which his impartiality might reasonably be questioned, a district judge should not be removed in a case where that standard is not even considered, let alone met.

In analyzing the existing constitutional and statutory structure, the starting point is the rule that the assignment of cases is within the province of the district court, subject to the authority of the judicial council to adopt such rules or orders if the district judges are unable to agree. 28 U.S.C. § 137; *see also* Fed. R. Civ. P. 83 (district courts may adopt local rules, subject to review by the judicial council of the circuit). The Constitution and

Congress have provided essentially three forms of procedure under which cases may be removed from the docket of a sitting district judge.

First, a district judge may be entirely relieved of his calendar and other duties only by the constitutional process of impeachment. U.S. CONST. art. II, § 4. As a form of impeachment *"pro tanto,"* reassignment orders may violate strongly defended constitutional guarantees. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting); *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60 (1982).

Second, the judicial councils of the circuits are authorized to make appropriate orders for the effective and expeditious administration of justice and judicial business within their circuits. 28 U.S.C. §§ 332(d)(1), 372(c)(6). It is the judicial councils, not individual appellate panels, that are given the statutory authority to reassign cases for reasons of disability or delinquency, *Chandler*, 398 U.S. at 102 (Harlan, J., concurring) (citing legislative history), and are also intended to address " 'any other matter which . . . could be made the subject of criticism, for which [a district judge] may be responsible.' " *Id.* at 123 (quoting testimony of Chief Justice Groner). To the extent reassignment orders reflect an appellate dissatisfaction with the district judge that is not based on bias or prejudice in the specific case, it is the role of the judicial council to address such matters.

Third, a judge may be disqualified from sitting in a particular case for good cause, as provided under Sections 144 and 455. Under either Section 144 or 455, a party's motion for disqualification must be supported by sufficient reasons, and the district court's decision is reviewable only for an "abuse of discretion." *See, e.g., Chitimacha Tribe of Louisiana v. Henry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982), *cert. denied*, 464

U.S. 814 (1983). Congress provided a stringent standard under Section 144, requiring a party to submit "a timely and sufficient affidavit that the judge . . . has a personal bias or prejudice" in the proceeding. Section 455(a) provides a less restrictive standard for disqualification, under which a judge must disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." *See, e.g., United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986). As amended in 1974, Section 455(a) is intended to reconcile federal statutory law with the "appearance of justice" standard for recusal adopted in the 1972 Code of Judicial Conduct. *SCA Services, Inc. v. Morgan*, 557 F.2d at 110, 113 & nn.3-8 (7th Cir. 1977).

In view of the pervasive applicability of these existing procedures, the willingness of the courts of appeals to assert a further, "inherent" reassignment power reflects an unsound expansion of their own jurisdiction. Broad reliance on 28 U.S.C. §§ 1651(a) and 2106 is misplaced; Section 1651(a) (the "All Writs Act") provides only that the courts may issue all writs "in aid of their respective jurisdictions," while Section 2106 merely provides a general appellate authority to affirm, reverse, or modify district court judgments and orders, and to require "such further proceedings . . . as may be just . . . ."

The assertion of the All Writs Act as a source for a reassignment power disregards this Court's express limitations on the appellate powers of the courts of appeals. *Will v. United States*, 389 U.S. 90, 95 (1967) (appellate court's power under the All Writs Act is limited to "exceptional circumstances amounting to a judicial 'usurpation of power' "); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-83 (1953) (authority under Section 1651(a) does not extend to control the decision of the trial court). As the effect of a reassignment order is necessarily to influence the future exercise of discretion by substituting a new judge to exercise such discre-

tion, reassignment is an effort to impose a prospective influence on discretionary determinations. This influence on the discretionary functions of the trial bench is alien to the appellate role. *Cf.* American Bar Association, *Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts* § 3.11, at 19 (1977) ("[a]ppropriate respect should be given to the trial court's exercise of discretionary authority"). As this Court has repeatedly declared, the appellate power is a power of review, not a power of intervention. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985).

Moreover, to find an implied reassignment power in the general provisions of Sections 1651 and 2106 violates the rule that the existing enactments embodied in Sections 144 and 455 are to be construed *in pari materia*:

> As always, "[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Any argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede that section ignores our long-standing practice of construing statutes *in pari materia*.

Crawford Fitting Co. v. J.T. Gibbons, Inc., —— U.S. ——, 107 S. Ct. 2494, 2499 (1987) (citations omitted).

The existing statutory scheme is adequate to address legitimate concerns of bias, impropriety, or incapacity of district court judges. By contrast, the essentially standardless exercise of reassignment powers is unsupported by sound precedent or judicial policy. If a judge should be removed from a case under the broad guidelines of Section 455(a), the courts should reach that conclusion expressly. Otherwise, the courts should not remove dis-

trict judges from pending cases without any statutory mandate, merely to advance individualized conceptions of the appearance of justice.

III. THE EXERCISE OF REASSIGNMENT POWER IN THIS CASE WAS CONTRARY TO THE EXPRESS FINDINGS REGARDING JUDGE REAL'S FAIRNESS AND IMPARTIALITY

Since federal law does not permit peremptory challenges of federal judges, a party's request for a new judge must necessarily be supported by some reason, justification, or good cause. Here, Yagman's request to the appellate panel was predicated on his allegations of bias, prejudice, and unfairness. These allegations were expressly rejected by the panel. Even in the paragraph in which the panel purported to justify its decision, it expressly stated, "We do not doubt Judge Real's ability to act fairly."

Notwithstanding that finding—repeated in different terms on numerous occasions in the opinion—the panel granted Yagman's request that the sanctions issue be reassigned to another judge. The reason given to support the decision is that the reassignment is needed to preserve the appearance of justice. Even assuming, *arguendo*, that an appellate panel might have some "inherent" reassignment power in a proper case, no such power exists in this case to contradict the panel's express findings of fairness and impartiality. The "appearance of justice" should not be a justification for reassignment where, as here, the court has repeatedly endorsed the fairness of every aspect of the trial and related proceedings.

If it is established that the judge in the case has been fair, and will continue to be fair, there should be no occasion to remove him from the case. Certainly, such occasion should not arise at the unfettered discretion of

the appellate panel, contrary to its express factual determinations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH A. BALL
BALL, HUNT, HART, BROWN & BAERWITZ
211 East Ocean Boulevard
Long Beach, CA 90802
(213) 435-5631

DONALD C. SMALTZ
(Counsel of Record)
LEIGHTON M. ANDERSON
PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90017
(213) 612-2500

Attorneys for Petitioner Manuel L. Real, Chief Judge, United States District Court for the Central District of California

August 13, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 87-5549

JERRY BROWN and GERRY FLEISCHER,
Plaintiffs,

v.

MICHAEL BADEN and SIDNEY WEINBERG,
Defendants,

STEPHEN YAGMAN and YAGMAN & YAGMAN, P.C.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, MICHAEL BADEN and SIDNEY WEINBERG,
Respondents.

Argued and Submitted April 6, 1987

Decided April 22, 1987

Brian O'Neill and Frederick D. Friedman, Santa Monica, Cal. and Ramsey Clark, New York City, for petitioners.

Donald C. Smaltz, Los Angeles, Cal., for respondents.

Harvey A. Schneider, Woodland Hills, Cal. and Mark E. Beck, Los Angeles, Cal. for defendants.

Petition for Writ of Mandamus from the United States District Court for the Central District of California.

Before ANDERSON, PREGERSON, and WIGGINS, Circuit Judges.

ORDER

PER CURIAM:

The appeal from the district court's order to show cause of January 12, 1987 has been construed by us as a petition for writ of mandamus to compel compliance with our prior decision in this litigation. We grant the writ of mandamus, thereby directing enforcement of our previous decision that Chief Judge Real be replaced by a judge randomly selected by the clerk of the district court. *See Matter of Yagman*, 796 F.2d 1165, 1188 (9th Cir.1986).

BACKGROUND

This litigation began in 1982 with a case in which Stephen Yagman (Yagman) represented the plaintiffs. The case was tried before Chief District Judge Manuel L. Real. After the plaintiffs rested their case, the district court granted the defendant's motion for a directed verdict and thereafter imposed sanctions totaling $250,000.00 against Yagman. The plaintiffs appealed. In a consolidated appeal, Yagman challenged the imposition of sanctions.

We upheld the district court as to its directed verdict and other challenged rulings. We reversed, however, the district court's sanctions award against Yagman. Additionally, due to "the massive sanction award and the numerous allegations of bias and overreaching . . . combined with this poor lawyering," we held that, to preserve the appearance of justice, the case should be reassigned upon remand to a randomly selected judge. *Yagman*, 796 F.2d at 1188.

A hearing was held before Chief Judge Real on November 17, 1986 for the purpose of spreading this court's judgment on the record of the district court. Chief Judge Real continued the hearing until January 12, 1987 for the purpose of awaiting the decision of the United States Supreme Court on Chief Judge Real's petition for mandamus following this court's decision in *United States v. Sears, Roebuck & Co.*, 785 F.2d 777 (9th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 580, 93 L.Ed.2d 583 (1986). The *Sears* decision ordered that case reassigned on remand from Chief Judge Real to another district judge. The petition before the Supreme Court challenged the power and authority of this court to order that reassignment. Chief Judge Real's petition for mandamus was denied without opinion.

At the continued hearing on January 12, 1987, Chief Judge Real, instead of reassigning the case, filed and served upon the parties an order to show cause. This order directed the parties to file briefs addressing this court's authority to reassign the case. Yagman immediately filed a notice of appeal from Chief Judge Real's order, accompanied by an emergency motion for a stay of the order. By order, we construed the appeal and motion as a petition for a writ of mandamus to compel compliance with our earlier decision. Further proceedings in the district court were stayed pending our decision here.

REASSIGNMENT

There is no doubt as to our authority to order a case reassigned. In the scheme of the federal judicial system, the district court is required to follow and implement our decisions just as we are oath- and duty-bound to follow the decisions and mandates of the United States Supreme Court. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this court must be followed by the lower federal courts no matter how mis-

guided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556 (1982). *See Sears*, 785 F.2d at 780-81; *United States v. Yagid*, 528 F.2d 962, 965 (2d Cir.1976). *See also* 28 U.S.C. § 2106 (1982).

Additionally, our decision ordering reassignment rested upon a long line of cases permitting a court of appeals to order reassignment of a case to a different judge in the exercise of the court's inherent power to administer the system of appeals and remands. *Sears*, 785 F.2d 777; *United States v. Alverson*, 666 F.2d 341 (9th Cir.1982); *United States v. Wolfson*, 634 F.2d 1217 (9th Cir.1980); *United States v. Ferguson*, 624 F.2d 81 (9th Cir.1980); *United States v. Robin*, 553 F.2d 8 (2d Cir.1977) (en banc); *Yagid*, 528 F.2d 962.

SANCTIONS

We deny Yagman's suggestion that all sanctions against him be abated. The determination of the appropriate sanctions award shall proceed upon remand with promptness and diligence.

CONCLUSION

Chief Judge Real's order to show cause is vacated. Yagman's petition for writ of mandamus is granted. The clerk of the court for the Central District of California is hereby ordered to randomly select another judge for this case in compliance with the rules of that court. The new judge is to be selected within seven days after the filing of this order.

PETITION GRANTED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-5839; 84-5957; 87-5549
D.C. No. CV 82-3268-R

IN RE: MATTER OF STEPHEN YAGMAN,
Appellant,

JERRY BROWN and GERRY FLEISCHER,
Plaintiffs,

v.

MICHAEL BADEN and SIDNEY WEINBERG,
Defendants.

STEPHEN YAGMAN and YAGMAN & YAGMAN, P.C.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
MICHAEL BADEN and SIDNEY WEINBERG,
Respondents.

Filed June 26, 1987

Before: J. Blaine Anderson, Harry Pregerson and Charles Wiggins, Circuit Judges.

Per Curiam

ORDER

The panel in No. 87-5549 has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on that suggestion. Fed. R. App. P. 35(b).

The order filed in No. 87-5549 on April 22, 1987 is amended to relieve the clerk of the district court of any obligation to randomly select another district judge for this case. That obligation shall remain with Chief Judge Real as previously ordered by this court.

The petition for rehearing is denied and the suggestion for a rehearing en banc is No. 87-5549 is rejected. The motion to dismiss the petition is DENIED as moot.

In Nos. 84-5839 and 84-5957, there is pending an application to adjudge Chief Judge Real in contempt of the order of this court for his failure to make the reassignment as directed by this court's decision and order of August 13, 1986. That application is hereby dismissed as premature in that Chief Judge Real has not exhausted the judicial remedies available to him and he may yet comply with this court's reassignment order and thereby purge himself of possible contempt.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5549

DC# CV-82-3268-R
Central California

IN RE: MATTER OF STEPHEN YAGMAN,
Appellant,

JERRY BROWN and GERRY FLEISCHER,
Plaintiffs,
vs.

MICHAEL BADEN and SIDNEY WEINBERG,
Defendants.

STEPHEN YAGMAN and YAGMAN & YAGMAN, P.C.,
Petitioners,
vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
MICHAEL BADEN and SIDNEY WEINBERG,
Respondents.

[Filed July 14, 1987]

ORDER

Before: ANDERSON, Circuit Judge.

Respondent's motion for stay of issuance of the mandate is GRANTED for a period of 30 days from the date of the filing of this order pursuant to Rule 41(b), Fed. R. App. P.

/s/ J. Blaine Anderson
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 82-3268-R

IN RE MATTER OF STEPHEN YAGMAN

[Filed Jan. 12, 1987]

ORDER TO SHOW CAUSE

This matter has been remanded to this court for determination of sanctions ". . . by a new, randomly selected judge." The parties are ordered to show cause on March 16, 1987 at 10:00 A.M. as to whether or not in the absence of an appeal from a motion pursuant to 28 USC Section 144 or 28 USC Section 455 ruled upon in the District Court the Court of Appeals has any power to reassign a case for hearing in the District Court before another judge.

Briefs shall be simultaneously be filed by the parties on or before February 13, 1987. Reply to the respective brief of a party may be filed on or before February 23, 1987.

The brief of each of the parties shall address at least the following questions:

1. What is the constitutional or statutory authority of the Court of Appeals in the assignment of cases in the District Court?

2. Does 28 USC Section 137 give the District Court upon majority agreement of the judges of District Court the exclusive right in the assignment and transfer of cases?

3. What is the definition of "the fragile appearance of justice?"

4. Is a massive sanction inimical to the appearance of justice?

5. Are allegations of overreaching inimical to the appearance of justice if found not true?

6. Is 28 USC Section 144 and 28 USC Section 455 the exclusive method for recusal of a judge?

7. Is a hearing required in the District Court pursuant to the General Orders of the Central District for determination of bias and prejudice pursuant to 28 USC Section 144 or 28 USC Section 455?

8. Is a District Court Judge entitled to a due process notice and hearing before recusal by the Court of Appeals?

9. Is the constitutional independenec of a trial judge intended in the adoption of Article III of the United States Constitution impacted by an attempt of a Court of Appeals to reassign a case from a judge sitting in the District Court?

10. What sanctions are available to the judge hearing this matter on remand?

11. Does either party have a due process right to a particular judge assigned to a case?

/s/ Manuel L. Real
MANUEL L. REAL
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5549

DC# CV-82-3268-R
Central California

JERRY BROWN and GERRY FLEISCHER,
Plaintiffs,

vs.

MICHAEL BADEN and SIDNEY WEINBERG,
Defendants,

STEVEN YAGMAN,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

[Filed Jan. 28, 1987]

ORDER

Before: ANDERSON, PREGERSON and WIGGINS, Circuit Judges

The appeal from the district court's order to show cause of January 12, 1987 is construed as a petition for writ

of mandamus to compel compliance with our prior decision in this litigation. The court would be assisted in its consideration of the petition by the filing of responses. Any responses to the petition shall be filed within 21 days of the entry of this order. If the district court named as respondent does not desire to appear in this proceeding, it may so notify the Clerk of Court by letter. Fed. R. App. P. 21(b). Defendants may, but are not required to, file a response.

Further proceedings in the district court are stayed pending a decision on the petition.

A TRUE COPY 1/28/87
ATTEST

CATHY A. CATTERSON
Clerk of Court

by: L. CALDWELL
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 84-5839, 84-5957

IN RE MATTER OF STEPHEN YAGMAN,
Appellant,

JERRY BROWN and GERRY FLEISCHER,
Plaintiffs-Appellants,

v.

MICHAEL BADEN and SIDNEY WEINBERG,
Defendants-Appellees.

Argued Feb. 7, 1986

Submitted Feb. 21, 1986

Decided Aug. 13, 1986

Stephen Yagman, Yagman & Yagman, P.C., Los Angeles, Cal., for plaintiffs-appellants in No. 84-5839.

Ramsey Clark, Weldon Brewer and Lawrence W. Schilling, New York City, for Yagman in No. 84-5957.

Harry Schneider, Woodland Hills, Cal., Anthony A. De Corso, Mark E. Beck, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before ANDERSON, PREGERSON and WIGGINS, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

Plaintiffs Jerry Brown and Gerry Fleischer appeal from the district court's grant of a directed verdict upon the motion of defendants Michael Baden and Sidney Weinberg. Plaintiffs' counsel, Stephen Yagman, appeals from the district court's imposition of sanctions against him individually and against his professional corporation. We affirm the directed verdict and reverse the order of sanctions.

BACKGROUND

On June 2, 1981, in Signal Hill, California, Signal Hill police officer Jerry Brown arrested Reginald Ronell Settles, a football star at nearby California State University at Long Beach. While attempting to book Settles at the Signal Hill station, a scuffle took place between Brown and Settles. Police cadet Gerry Fleischer came to Brown's aid and helped subdue Settles. Brown then finished the booking procedure and Settles was taken to a holding cell. About one hour later, Settles was found dead in his cell, hanging by the neck from a mattress cover which had been looped over the cell's door jam.

The death and subsequent events were extensively publicized in the local media. An autopsy conducted by the Los Angeles County Coroner's office, which found multiple traumatic injuries on the body, including hemorrhaging of the esophagus, resulted in a determination that the cause of death was suicidal hanging. Because of continued media controversy and public dissatisfaction, however, Coroner Thomas Noguchi empaneled a coroner's jury. In September, 1981, the jury decided, by a vote of five to four, that the death was caused by another person or persons. Noguchi did not change his decision as to the cause of death after receiving this advisory verdict.

The Los Angeles County District Attorney conducted a criminal grand jury investigation of Settles' death from June 3, 1981 to January 8, 1982. On January 8, 1982, the District Attorney announced that the investigation had not developed sufficient evidence to warrant criminal charges, but that if any new information came to his attention, he would go forward with additional investigation. (Reporter's Transcript, March 20, 1984, p. 27). Shortly before this announcement, in December, 1981, the Settles family filed a civil action against Brown, Fleischer, and the City of Signal Hill and its officials, seeking damages for Reginald Settles' death. Attorney Stephen Yagman represented Brown in defense of this civil action.

In early 1982, the Settles family decided that a second autopsy of the body was needed. Dr. Sidney Weinberg, the Medical Examiner of Suffolk County, New York, and Dr. Michael Baden, Weinberg's deputy, agreed to conduct the re-autopsy for no fee. (Reporter's Transcript, March 22, 1984, p. 10). The re-autopsy was conducted on March 24, 1982 in the Suffolk County autopsy facilities, which the Settles family rented from the county for a fee of $500.00. In addition to Weinberg and Baden, the re-autopsy was attended by Dr. Werner Spitz, who was retained by the City of Signal Hill, Dr. Noguchi, representing the Los Angeles County Coroner's office, Los Angeles County Deputy District Attorney Gilbert Garcetti, and attorneys representing the various parties.

Three months later, on June 26, 1982, the doctors gathered in Suffolk County to discuss the re-autopsy. An initial meeting was held in Dr. Weinberg's office, attended by doctors Weinberg, Baden, Spitz, and Noguchi, two attorneys representing the Settles family, Deputy District Attorney Garcetti, Signal Hill attorney Inlow Campbell, and, for a brief period, attorney Stephen Yagman. At the meeting, each of the four doctors spoke in turn about the findings of the re-autopsy and the cause

of death. Following the meeting in Dr. Weinberg's office, the doctors held a press conference where they again spoke individually about the results of the re-autopsy and the cause of death. Various representatives of the news media (including national television) were present.

On July 1, 1982, Brown and Fleischer (plaintiffs), represented by Stephen Yagman (Yagman), filed a diversity action in United States District Court alleging that they had been defamed by Weinberg and Baden (defendants) during both the private meeting in Weinberg's office and the press conference. The case was calendared before District Judge Lawrence T. Lydick and progressed toward trial for nearly two years. During this time, Judge Lydick ruled on numerous motions, including several for summary judgment, to compel discovery, and for sanctions. On March 14, 1984, six days before the scheduled trial date, the action was transferred to Chief Judge Manuel L. Real.

As scheduled, the parties met on March 20, 1984, in front of Judge Real. Due to court calendar conflicts, trial was reset to begin April 3, 1984, with no objections. Judge Real used available time on March 20 and 22 to hear evidence and argument on the choice of law issue, eventually ruling that California law would be applied.

The action was tried on April 3-5, 1984. During the course of the trial, Judge Real made several rulings about which plaintiffs complain. For example, the court ordered opening statements to be made to the entire prospective jury panel before the jury voir dire was conducted. Also, the court ordered plaintiffs to put on evidence of damages before evidence of liability. Further, the court excluded various of plaintiffs' proposed evidence, including the testimony of a proposed expert witness. Most importantly, when plaintiffs rested their case, the court granted defendants' motion for a directed verdict. Thereafter, the court imposed sanctions totaling

$250,000.00 against Yagman and his professional corporation, based on the authority of Fed. R. Civ. P. 11; 28 U.S.C. § 1927, and Central District Local Rule 27.1.

Plaintiffs appeal the directed verdict against them on all grounds specified by the court, as well as various subsidiary rulings made by the court throughout the trial. In addition, plaintiffs levy charges of bias against Judge Real and allege that they were denied a fair trial. In a consolidated appeal, Yagman is represented by separate counsel in challenging the court's imposition of sanctions.

DISCUSSION

A. CHOICE OF LAW

The choice of law issue was vigorously contested before trial. In a twist of arguments, the California resident plaintiffs asked that New York law be used, while the New York resident defendants contended that California law should be applied. The district court, after briefing and a hearing, agreed with defendants and chose California law. We review this question of law *de novo*. *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 724 (9th Cir. 1986) (citing *In re McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc)).

In order to make the correct choice of law in a diversity case such as this, the federal court must apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477, 1480 (1941); *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1025 (9th Cir.), *cert. denied*, 464 U.S. 846, 104 S.Ct. 149, 78 L.Ed.2d 139 (1983). California uses a "governmental interest" approach to the choice of laws. *Nelson v. International Paint Co.*, 716 F.2d 640, 644 (9th Cir. 1983); *Fleury*, 698 F.2d at 1025; *Hurtado v. Superior Court of Sacramento County*, 11 Cal.3d 574, 579, 114 Cal. Rptr. 106, 109, 522 P.2d 666, 669 (1974). Under this ap-

proach, it is obvious that both California and New York are "interested" states. Each has an interest in having its laws applied, due primarily to the fact that residents of each are parties to this action, and despite the fact that the residents urge against application of their own state's laws.

What is not so obvious, however, is whether there is any material difference between the substantive laws of New York and California, as they apply to this case. It is axiomatic that, unless there is a difference between the laws of the states, a choice need not be made. *Nelson*, 716 F.2d at 644; *Fleury*, 698 F.2d at 1025. Plaintiffs have not demonstrated any differences,[1] and defendants accurately point out that in many instances the laws of the two states will be identical since they address federal constitutional issues that are controlled by United States Supreme Court authority. Nevertheless, plaintiffs have indicated in passing that they prefer New York law because it has no privileges and immunities which might bar their claims. Because the district court's directed verdict rested in part upon privileges supplied by California law, we will assume for purposes of deciding this issue that differences do exist between the laws of New York and California.

Under the California governmental interest approach, where two interested states have conflicting laws, the court will apply "the law of the jurisdiction whose interest would be more impaired if its law were not applied." *Nelson*, 716 F.2d at 644 (citing *Liew v. Official Receiver and Liquidator*, 685 F.2d 1192, 1196 (9th Cir. 1982)). Without question, the district court was correct in concluding that in this case California's interest would be more impaired if its laws were not applied. New

---

[1] Plaintiffs' attempt to incorporate by reference, into their brief, memoranda submitted to the district court below is prohibited by Ninth Circuit Rule 13(i).

York is indeed the state in which the defendants both reside and in which the allegedly defamatory remarks were uttered. However, because California is the state in which both plaintiffs lived and worked throughout the transactions involved, it is the state where the damage to plaintiffs' reputations, if any, would have occurred. As the district court noted, New York has "absolutely no interest in the reputation of a California citizen." (Reporter's Transcript, March 22, 1984, p. 40). The fact that California is the forum state further strengthens our conclusion, for we have said that in cases of this nature application of the laws of the forum state is preferred. *Fleury*, 698 F.2d at 1025. For these reasons, we agree with the district court's choice of laws.[2]

B. OPENING STATEMENTS

The district court ordered the parties to make their opening statements to the entire prospective jury panel before voir dire.[3] Plaintiffs argue, without supporting authority, that it is a violation of due process for counsel "to communicate with a jury in any fashion before the members of the jury are sworn. . . ." (Plaintiffs' brief at 48). We disagree with this broad proposition. Certainly there may be situations in which communication to the jury would give rise to due process concerns, but this could not be true in the situation at bar. The district judge, in ordering the special procedure for open-

---

[2] Plaintiffs' argument that questions of fact needed to be decided by the jury before the choice of laws issue could be resolved is not well taken. Not only have plaintiffs been unable to identify the disputed factual issues that they claim were in need of resolution, but as the discussion above illustrates, a choice of law under the governmental interest approach is a legal determination to be made by the court.

[3] Plaintiffs' counsel twice waived the opportunity to make an opening statement, once before the district court announced the procedure for opening statements and once after.

ing statements, was obviously concerned about the substantial publicity that had surrounded the events leading up to the trial. By making opening statements to the prospective jurors, the court hoped to acquaint all panel members with the case so that they could better determine if they could fairly sit on the jury. The opening statements were made in open court and voir dire followed immediately. There were no improper communications with the jury. It must be remembered that the conduct and order of the trial are matters vested in the discretion of the district judge. *Chicago, Milwaukee, St. Paul & Pacific R. Co. v. Poarch*, 292 F.2d 449, 452 (9th Cir. 1961). The district court did not abuse its discretion in this instance.

C. DIRECTED VERDICT

The district court granted defendants' motion for directed verdict on nine grounds. We review the directed verdict *de novo*, using the same standard applied by the district court. *Jenkins*, 785 F.2d at 729. Under that standard, a directed verdict is proper if the evidence permits only one reasonable conclusion as to the verdict. *Othman v. Globe Indemnity Co.*, 759 F.2d 1458, 1463 (9th Cir. 1985). Therefore, we must examine all the evidence in the light most favorable to the plaintiffs to decide whether there is substantial evidence that could support a finding in favor of plaintiffs. *Id.*

One of the grounds for the directed verdict was the court's finding that "all statements made by the defendants which are the subject of this action constituted expressions of opinion, and not statements of fact." As previously mentioned, defendants' statements which kindled this action were uttered at both the private meeting in Dr. Weinberg's office and the subsequent press conference. Plaintiffs argue that the district court erred because the statements were clearly statements of untrue fact, or, at a minimum, capable of being interpreted as

such by a jury. Specifically, plaintiffs allege that the defendants "touted themselves as ones in positions to know the facts," and stated as a matter of fact that the plaintiff police officers had murdered Settles. (Plaintiff's brief at 30). The determination of whether a challenged statement is one of fact or of opinion is a question of law, appropriate for *de novo* review on appeal. *Lewis v. Time Inc.*, 710 F.2d 549, 553 (9th Cir. 1983); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980); *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 601, 131 Cal. Rptr. 641, 644, 552 P.2d 425, 428 (1976); *see also Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied*, —— U.S. ——, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985); *Rinsley v. Brandt*, 700 F.2d 1304, 1309 (10th Cir. 1983); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir.), *cert. denied*, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979).[4]

It is by now well settled that there exists a constitutional privilege for expressions of opinion. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court identified this privilege, based on the principle that "[u]nder the First Amendment there is no such thing as a false idea." *Id.* at 339-40, 94 S.Ct. at 3007, 41 L.Ed.2d at 805. *See also, Lewis*, 710 F.2d at 552-53. It follows from this principle that since an opinion is protected because it cannot be false and a statement is not actionable defamation unless it is false, "an opinion is simply not actionable defamation." *Lewis*, 710 F.2d at 553 (citing *Restatement (Second) of Torts* § 558(a) (1977)). "It makes no difference whether the plaintiff alleging the defamation is a private or a public person." *Lewis*, 710 F.2d at 553.

---

[4] Although plaintiffs do note in passing our *de novo* standard of review over this issue, as cited in *Lewis*, we reject plaintiff's apparent simultaneous contention that the issue must be remanded for a jury determination.

The difficulty that often arises, however, is in attempting to determine whether a publication constitutes a statement of fact or a statement of opinion. Not only is "accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation" an inherently delicate and sensitive task, *Ollman*, 750 F.2d at 974, it is made yet more difficult by "the richness and diversity of language, as evidenced by the capacity of the same words to convey different meanings in different contexts. . . ." *Id.* at 978. This determination cannot be accomplished through application of a mechanical test, for the question presented does not lend itself to bright-line mechanics. Rather, in determining whether an allegedly defamatory statement is actionable fact or protected opinion, the court must:

> examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Information Control, 611 F.2d at 784.

In making this determination at bar, we are aided by the fact that the press conference was recorded on video tape. Rather than relying on the recollections and approximations of witnesses, we are able to review the exact statements made by the defendants at the conference and the precise context and language in which they were uttered. Our first observation is that nowhere at the press conference did either defendant expressly allege that one or both of the plaintiffs murdered Reginald

Settles. In fact, neither of the plaintiffs were named at the press conference. Without question, however, some amount of implicit reference to plaintiffs was made at the conference.[5] Moreover, under the circumstances present at the time of the press conference, there is no question that all suspicion was directed squarely at plaintiffs. It is undisputed that plaintiffs were the only police officers who had access to Settles during the time period in which he died. Consequently, plaintiffs were the targets of a grand jury investigation and a civil suit launched by the Settles family. At the same time, the media had focused public scrutiny on plaintiffs from the start, by virtue of the close coverage given to the case. Therefore, any inferences made at the press conference, whether fact or opinion, were clearly understood to involve plaintiffs. *See Church of Scientology of California v. Flynn*, 744 F.2d 694, 697 (9th Cir. 1984).

We are convinced, however, after analyzing the challenged statements in their total context, that the district court was correct in holding that they were constitutionally protected opinion. The circumstances surrounding the statements, the context in which they were uttered, and the language employed all lend support to this conclusion.

We have recognized that in a situation such as this, the words used are not by themselves determinative. *Information Control*, 611 F.2d at 783-84. It is important that the facts surrounding the publication be duly considered because words are not defamatory unless they are understood in a defamatory sense. *Id.* In the factual surroundings at bar, it is important to note that the

---

[5] For example, defendant Baden made a clear reference to plaintiffs when, in discussing the general concern about inaccuracies common to information gathering after an in-custody death, he said "[t]his becomes even more of a problem when the people involved do not testify in a grand jury process, as, for example, happened here." (Transcript of Exhibit No. 214 at 17).

statements complained of concerned a hotly disputed issue: the unresolved cause of Settles' death. Although the official cause of death was listed by the Los Angeles County Coroner as suicidal hanging, it was by no means the consensus. The coroner's advisory jury voted five to four that the death was caused by another person or persons. The Settles family believed the same when they instigated their civil suit. The Los Angeles District Attorney appeared dissatisfied with the suicide finding. Public and media attitudes were, at best, skeptical. Against this backdrop, defendants were brought in as expert forensic pathologists to conduct the second autopsy in an effort to resolve the cause of death issue. Defendants were not paid for this service, although it can be assumed that defendants would have been retained as expert witnesses for the Settles family in the civil action.[6] Also invited to participate in the re-autopsy were Dr. Noguchi, whose office had performed the first autopsy, and Dr. Werner Spitz, a pathologist retained by the civil suit defendants.

It can be clearly deduced from this background that the overriding purpose of each of the four doctors, including defendants, in conducting the re-autopsy was to analyze the facts and render an opinion regarding the cause of death. With this purpose in mind, it is entirely logical that once the re-autopsy was completed, and the facts compiled and analyzed, the doctors would meet with the interested parties to render their opinions. Such was the apparent purpose of the initial meeting that took place in defendant Weinberg's office. Further, due to the close media coverage afforded developments in the case,

---

[6] The civil action was settled out of court. Although defendants were apparently never formally retained as experts for the Settles family, the opinions they formed about the cause of death make it safe to assume that they would have been so retained for trial. This assumption is also proper since we must view the facts and inferences in the light most favorable to plaintiffs.

it is logically consistent that the four doctors would volunteer to share their long-awaited opinions with the eager media.[7] Viewed in the context of the background and circumstances in which the statements were made, therefore, the strongest conclusion to draw is that the statements were the individual opinions of the doctors.

The context of the statements as made at the press conference and the language used by the doctors strengthen our conclusion to the point of certainty. First of all, the press conference was structured so that each doctor in turn stated his opinion as to the cause of death, the basis for drawing that opinion, and then answered questions from the gathered media. It was strikingly clear from the start of the conference that the doctors were interpreting findings and presenting their individual opinions. In prefacing the conference, defendant Weinberg stated:

> After an exhaustive study of the Ron Settles death, [the four doctors] met today to discuss our findings. We are agreed on certain findings, and we do have certain differences on other aspects and other findings in the case. And each of the doctors here will be glad to answer questions or present his point of view.

(Transcript of Exhibit No. 214 at 6). Further, in answering an early question, Dr. Spitz stated:

> I think the other gentlemen should speak for themselves. Partly there is agreement; partly there is

---

[7] A true opinion is no less an opinion, nor does it lose its protected status, merely because it is offered in a public rather than private forum. "[W]e cannot forget that the public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain. The First Amendment is served not only by [statements] that purport to be definitive but by those [statements] that . . . raise questions and prompt investigation or debate." *Ollman*, 750 F.2d at 983.

> not agreement with regards to interpretation, not with regards to the findings.
>
> There can be no misinterpretation with regard to the findings, because they are there.

(Transcript of Exhibit No. 214 at 11). Plainly, the statements were made at the conference in the context of an airing of opposing opinions by four doctors who had compiled, analyzed and discussed the same objective data.

Second, we have recognized the importance of looking at the language of an allegedly defamatory statement, particularly where it is " 'cautiously phrased in terms of apparency' or is of a kind typically generated in a spirited legal dispute. . . ." *Information Control*, 611 F.2d at 784 (quoting *Gregory*, 17 Cal.3d at 603, 131 Cal. Rptr. at 645, 552 P.2d at 429). Cautionary language may put the listener on notice that what is being heard is opinion, "and thus weaken any inference that the [speaker] possesses knowledge of damaging, undisclosed facts." *Ollman*, 750 F.2d at 983.

The language used by each of the four doctors was heavily punctuated with cautionary terms such as "in my opinion" and "my view." Plaintiffs aptly argue that otherwise defamatory statements cannot be immunized by the mere insertion of cautionary language. It is because we agree with this proposition that we have emphasized that the language of the statement involved is only one of several factors to be considered in this assessment. *See Information Control*, 611 F.2d at 783-84; *Lewis*, 710 F.2d at 553. The content of the statements at bar, however, cleary belies any notion that the cautionary language employed by the doctors was inserted to disguise factual assertions and escape liability. The content of the statements reveals only true expressions of opinion. Each doctor carefully emphasized that he was expressing only his opinion, and each detailed the basis

for that opinion. The opinions were naturally based upon each doctor's interpretation of the objective facts in light of his own experience. In addition, due to the inconclusiveness of the objective facts, each doctor left ample room for the consideration of opposing interpretations of the facts. For example, defendant Baden stated:

> it is my opinion that although suicidal hanging can't be excluded . . . the findings are atypical for the kind of hangings that we investigate that occur in custody and is more likely to be due to bilateral compression of the neck . . . my view would be different than Dr. Spitz' . . . the pattern, to me, from my experience of lack of injury to the skin, lack of marks on the skin, minimal injuries in the underlying tissues of the neck and the peculiar hemorrhage in the esophagus that Dr. Weinberg has studied very closely, to my interpretation, is more common for neck compression. . . . And this, to my mind, does not conform to the pattern of suicidal jail hangings, either by the anatomical findings at autopsy, by the chemical findings or absence thereof, and by the circumstances. . . . I do not think there is suffcient evidence to say beyond a reasonable—to a reasonable medical certainty death is by chokehold. But I think it is more likely —51 percent versus 49 percent.

(Transcript of Exhibit No. 214 at 13-19).[8] Consequently, we are convinced that the statements of the defendants were constitutionally protected opinion. Taken together, the language used, the context of the statements and the surrounding circumstances clearly demonstrate that the

---

[8] Defendant Weinberg prefaced his interpretation of the medical evidence and circumstances attending the death by stating "[a]s you can see, there is a diversity of opinions among the four so-called experts. I would like to briefly state my opinion and my feeling." (Transcript at 29). Similarly, Doctors Spitz and Noguchi carefully explained their interpretations and emphasized that each was presenting his own personal opinion. (Transcript at 7-13, 25-29).

allegedly slanderous remarks could only be understood as the individual opinions of the defendants.

We reject plaintiffs' contention that the statements are not constitutionally protected, even if they are opinion, because they involve accusations of criminal conduct. Although courts have held that "opinions" which accuse dishonesty or criminal conduct are not constitutionally protected because they are too laden with factual content to be protected as belief *e.g., Cianci v. New Times Publishing Co.*, 639 F.2d 54, 62-65 (2d Cir.1980); *Gregory*, 17 Cal.3d at 604, 131 Cal.Rptr. at 646, 552 P.2d at 430, we do not believe the instant action falls within the confines of that authority. First, the action at bar is factually distinguishable from *Cianci*, the case principally relied on by plaintiffs. In *Cianci*, the plaintiff was explicitly named and accused of raping a woman and subsequently paying her off to escape prosecution. Conversely, in the statements at hand, the plaintiffs were never explicitly named, nor were they specifically charged with wrongdoing. We have recognized that various inferences can be drawn which link plaintiffs to the death, but those inferences are based upon speculation and divided expert opinion, as discussed above. Certainly, those inferences are not "laden with factual content" as contemplated by *Cianci*. Second, the only "facts" set out at the conference were those undisputed medical findings upon which the varying interpretations and opinions were based.[9] We have held that when the underlying facts are

---

[9] Plaintiffs allege that "since appellees set forth the 'facts' on which their alleged 'opinions' were based, and since the 'facts' were false, the 'facts' constitute actionable defamation." (Plaintiffs' brief at 31). Plaintiffs do not specify, however, any "facts" that were false. Presumably, plaintiffs refer to the only "facts" to be set out at the conference, the undisputed medical findings. These included damage to the esophagus, markings on the neck, other injuries and markings on the body, chemicals in the blood, and condition of the body when found. Assuming that these are the facts referred to by plaintiffs as false, their argument is not well

true, as here, the Constitution protects the opinion from liability. *Lewis*, 710 F.2d at 556.

We recognize further that, unlike the statements made at the press conference, the statements made at the private meeting were not recorded. Consequently, we cannot as readily examine the specific statements made at the private meeting. Nevertheless, we are convinced that they too were protected statements of opinion. As noted previously, the context of the private meeting was a gathering by interested parties in the civil suit in order to learn the findings and opinions of the four pathologists. Further, plaintiffs' witness admitted that, except for greater detail concerning the medical findings, the statements made at the private meeting were essentially the same as those made at the press conference.[10] Con-

---

taken because these objective facts were recognized by the four doctors who took part in the re-autopsy. Nothing in the proffered testimony of plaintiffs themselves or the proposed opinion of plaintiffs' expert, which was excluded, can contradict the factual medical data. In fact, plaintiffs' witness Inlow Campbell admitted that the four doctors agreed upon these physical facts. (Reporter's Transcript, April 4, 1984, Vol. 2, pp. 88-93).

[10] On cross-examination at trial, Mr. Inlow Campbell testified as follows:

> Counsel: Isn't it a fact, Mr. Campbell, that except for going into more detail concerning the medical findings at the private meeting, what Dr. Weinberg and Dr. Baden said at the press conference which is on the video tape is essentially the same as they said at the private meeting?
>
> Witness: Just about, yeah. The medical detail was gone into I think in greater depth in the private meeting.
>
> I don't recall the discussion and demonstration of the choke hold at the press conference that occurred at the private meeting, and there were some other things that were more the background of the case than the medical parts that were discussed in the private meeting.
>
> Counsel: With respect to the question of the manner in which Reginald Settles died, can you presently think of any

sequently, we draw identical conclusions with respect to the private meeting statements. If anything, our conclusion that these statements are opinion is made stronger by the more limited and more peculiarly interested audience. We have previously pointed out that the audience and the audience's anticipations should be considered in determining whether a statement is fact or opinion. *Lewis*, 710 F.2d at 553-54; *Information Control*, 611 F.2d at 784. Inasmuch as the audience at the private meeting was made up of those persons most intimately involved in the underlying civil litigation, most, if not all, of whom had attended the re-autopsy and anticipated this conclusory meeting, it is entirely unlikely that the challenged statements were understood as anything other than nonactionable opinion.

Our holding, therefore, is that the allegedly slanderous statements were, as a matter of law, constitutionally protected opinion. As a result, the district court was correct in directing the verdict in favor of the defendants. We need not address the remaining grounds for the directed verdict.

D. EXCLUSION OF EVIDENCE

Plaintiffs object to the district court's exclusion of parts of their own testimony and all of the testimony of their proposed expert witness.[11] We need not decide if it was an abuse of discretion to exclude that evidence, however, because assuming *arguendo* that exclusion was error, it was most certainly harmless. "A trial court's error in excluding evidence in civil actions is harmless

---

statement that was said by Dr. Baden or Dr. Weinberg at the private meeting that is not contained on the video tape?

Witness: In substance, no.

(Reporter's Transcript, April 4, 1984, Vol. 2 at 86-87).

[11] Plaintiffs' failure to provide the relevant pages of the reporter's transcript in the excerpt of record on appeal is a violation of Ninth Circuit Rule 13(a)(1)(B).

if its decision is 'more probably than not untainted by the error.'" *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1516 (9th Cir.1985) (quoting *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir.1983)). The excluded evidence was proffered on the issue of actual malice. Since we have concluded that the directed verdict was proper on the ground that the statements were protected opinion, any error in excluding evidence as to the actual malice issue was harmless.

E. ALLEGATIONS OF UNFAIRNESS

Plaintiffs levy very serious charges of misconduct against Judge Real. In short, they allege: (1) that Judge Real "reached out and took this case" in violation of the local rules, and (2) that Judge Real erred by not recusing himself *sua sponte* on the grounds of personal prejudice.

1. *Random Transfer*

Shortly before the scheduled trial date, Judge Lydick became ill and this action was transferred to the calendar of Judge Real. The transfer was accomplished by an order which was signed by both judges. Plaintiffs allege that this transfer violated the local rules of the Central District of California concerning random assignment of cases and ask that we reverse all of Judge Real's rulings and remand for random reassignment and retrial.

General Order No. 224, promulgated pursuant to the local rules, governs the assignment of cases within the Central District. Rule 4.1 flatly provides for the voluntary transfer of an action from one judge to another. All that is required to effectuate such a transfer is an order executed by the two judges.[12] It is clear that the

---

[12] The text of Rule 4.1 provides as follows:

4.1 VOLUNTARY TRANSFERS

The judge to whom any particular action or proceeding is assigned will have full charge of such case until terminated

transfer at bar was made pursuant to this rule. Plaintiffs argue, however, that the transfer violated rule 4.4, which provides that in the event of the "prolonged illness, disability, or other unavoidable absence" of a presiding judge, the court may randomly reassign cases from that judge's calendar.[13] Contrary to plaintiffs' argument, Rule

---

except that (1) the matter may be transferred by order of the transferor and tranferee judge, or (2) by order of the Chief Judge, with the consent of the transferor and transferee judge. If such a transfer is made it shall be respectively debited and credited against the transferor and transferee judges' general obligation to receive civil cases.

[13] The text of Rule 4.4 provides as follows:

4.4 PROLONGED ILLNESS OR UNAVOIDABLE ABSENCE

In the event of prolonged illness, disability, or other unavoidable absence of the judge to whom a civil case has been assigned, the Court may transfer from the calendar of such absent judge any case or cases deemed necessary to expedite the business of the Court and obtain justice for the litigants. Such case or cases shall be returned to the Clerk for assignment in the same manner as an original case assignment as provided in this General Order.

Original case assignment is provided for in Rules 1.2, 1.3 and 1.4 as follows:

1.2 ASSIGNMENT CARDS

Assignment cards shall be prepared and sealed in plain envelopes under the supervision of the Chief Judge in such a manner that each judge of the Court over a period of time shall be assigned substantially an equal amount of work. The envelopes containing the assignment cards shall be shuffled to provide a completely random assignment of cases to the judges of the Court.

Neither the Clerk or any Deputy Clerk shall have discretion in determining the judge to whom any civil case shall be assigned. The action of the Clerk in the assignment of cases is ministerial only.

1.3 RANDOM SELECTION

The method for assignment of cases chosen by the judges shall be such that the judge to whom any particular matter is

4.4 is not mandatory in every instance of illness. Rather, it merely supplies a means for the court to take a case from an unavailable judge in the interest of justice. There is nothing in these rules to prohibit an ill judge from transferring a case pursuant to Rule 4.1, as was done here.

We further decline plaintiffs' urging that we invoke the general supervisory power of this court to reverse the district court on the basis that the transfer to Judge Real is "suspicious." [14] As discussed below, the motive attributed to Judge Real by the plaintiffs is speculative and entirely unsupported by the record. We will not invade the province of the district court on such a feeble basis. We nevertheless take this opportunity to underscore the concerns for avoiding the appearance of arbitrariness and unfairness that we expressed in *United States v. Flynt*, 756 F.2d 1352, 1355 n. 2 (9th Cir. 1985). In providing for the random assignment of cases, the "General Order evinces a policy of objectivity and fairness in the distribution of all matters . . . that . . . is important to the fair administration of justice. . . ." *Id.* Courts must be meticulously careful, when invoking direct transfer provisions such as the instant Rule 4.1, to avoid any improper appearance. In order "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Aetna Life Insurance Co. v. Lavoie*, —— U.S. ——, ——, 106 S.Ct. 1580, 1587, 89 L.Ed.2d 823, 835 (1986) (citations omitted).

---

to be assigned, shall not be known by or disclosed to the Clerk, any member of his staff or any other person until after such case has been filed and numbered.

1.4 ASSIGNMENT TO A PARTICULAR JUDGE

The Clerk shall, after filing and numbering the case, withdraw a sealed envelope containing the initials of the judge to whom the case is to be assigned.

[14] This should not be read as an acknowledgment that our supervisory power would necessarily reach to this situation. Because we need not answer that question, we leave it for another day.

2. *District Court Bias*

Plaintiffs allege that they were denied their day in court from the time Judge Real took over the case, due to his "patent hostility" and his "one-sided and arbitrary" conduct of the trial. Terming it a "judicial mugging" and "tyranny in its worst form," plaintiffs charge that Judge Real "exhibited a strong personal bias and prejudice against Stephen Yagman of unmistakable long-standing [sic], and a partiality for the defendants" that was manifested in rulings and actions throughout the trial. Having reviewed the entire trial transcript, we find no grounds for reversal.

We recognize that we cannot really resurrect the atmosphere at trial, the tone of voice, or the facial and other body language. We are nonetheless convinced by the cold record on this appeal that plaintiffs' misconduct allegations must fail. Although, from a broad viewpoint, there was obviously a certain amount of tension at trial, such is not uncommon in emotional and hard-fought cases. Because the nature of our system is adversarial, parties will occasionally be uncooperative, both with each other and with the court, and courts will sometimes be exacting. These elements foster tension. The single most important concern in these situations, as in every case, is ensuring that all parties are afforded a fair and complete opportunity to present their evidence and arguments. We have no doubt that the plaintiffs in this case fairly received their day in court.

One of plaintiffs' specific complaints is that Judge Real required them to put on evidence of damages before liability. That ruling was brought about by a verbal exchange between Judge Real and Yagman that displays frustration on the part of both men.[15] To be sure, the

---

[15] The exchange, which took place before the jury was seated on the first morning of trial, went as follows:

ruling inconvenienced plaintiffs in that they had to alter their order of proof, but even if we assume *arguendo*

THE COURT: Are you asking for only nominal damages? Is that it?

MR. YAGMAN: No, we're not, your Honor.

THE COURT: Then if you're going to put on a question of damages, what kind of evidence are you going to put on on damages?

MR. YAGMAN: We haven't yet determined that, your Honor.

THE COURT: Well, this is the day of trial, Mr. Yagman.

MR. YAGMAN: YES, I—

THE COURT: I would guess that you would have that ready. What evidence are you going to put on?

MR. YAGMAN: It's ready in alternative forms, your Honor.

THE COURT: Beg your pardon?

MR. YAGMAN: A decision has not yet been made. We are not prepared.

THE COURT: What do you mean? This is the day of trial, Mr. Yagman. Now, what evidence are you going to put on on the question of damages?

MR. YAGMAN: I'm not prepared to answer that question, your Honor.

THE COURT: If you're not prepared to answer that question, than I am prepared to rule on the question of damages and what evidence would be admissible on that question.

MR. YAGMAN: Your Honor, it's our plan—

THE COURT: You're going to tell me that or I'm going to rule and you're not going to put on any evidence of damages. You're going to go on the so-called per se rule that you're talking about.

MR. YAGMAN: We are, your Honor.

THE COURT: That's it? You're not going to put on any evidence of damages?

MR. YAGMAN: That's correct.

THE COURT: So you are asking for only nominal damages?

MR. YAGMAN: No, we're not, your Honor.

THE COURT: Well, then, what are you going to put on for nominal damages?

MR. YAGMAN: We're going to put on the testimony of what was said, which was defamatory, so that the jury can

that the ruling was erroneous, we cannot agree that plaintiffs were harmed. Plaintiffs did in fact present evidence of damages and were then given a complete opportunity to present evidence of liability. We are satisfied that plaintiffs received a fair trial in this respect.

Plaintiffs also charge that Judge Real's questioning of witnesses was hostile and designed to elicit responses favorable to the defendants. We disagree. The district court has a right and a duty "to facilitate, by direct participation, the orderly progress of a trial." *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1383 (9th Cir.1984) (citations omitted). Judge Real's queries were obvious efforts to clarify relevant testimony. Such questions "are eminently proper so long as the authority is exercised in a non-prejudicial manner." *Id.* We find the questions asked were well within the court's authority and discretion.

We have also considered plaintiffs' more general complaint that Judge Real was one-sided in his rulings as a whole, tending to rule in favor of defendants by rote.

---

evaluate what harm it believes the publication of those statements caused to the plaintiffs.

THE COURT: Well, that isn't evidence, and if you're going to rest on that, let me tell you now, now, you won't get beyond your case if you're going to rest on that. Let me tell you that now, because that's what you're telling me, that this jury is going to have to make some determination of damages other than nominal damages on no evidence of damages. That's what you are telling me.

MR. YAGMAN: I've tried to explain to the Court, we have not yet made a decision.

THE COURT: I'm asking you to make that decision because this is the day of trial. You are now ready for trial. And if I want to, I will ask you to put the damage evidence on first, which I can do in my discretion.

Now, we'll do that, Mr. Yagman. You will put on the evidence of damage first. Then we will go to the question of liability.

(Reporter's Transcript, Apr. 3, 1984, pp. 25-27).

We disagree with plaintiffs' characterization of the rulings as arbitrary. For example, plaintiffs state that when "Judge Real brushed aside Judge Lydick's careful" choice of law ruling, it was "the first of a virtually unbroken chain of rulings . . . favoring the defendants. . . ." (Yagman's brief at 29). Judge Real's choice of law ruling, however, which we have held to be correct as a matter of law, was made after two days of pre-trial hearings at which both parties presented evidence, questioned witnesses and argued their positions. Further, it must be recognized that during the course of a trial, the court may be required to make hundreds of individual rulings. An even distribution of these rulings in favor of each party is obviously not a prerequisite for, nor synonymous with, a fair trial. We are satisfied, after reviewing the entire transcript, that the district court was not arbitrary in this case.[16]

Finally, because the essence of plaintiffs' claim is that they were denied a fair trial due to the district judge's bias, we have analyzed this situation under the standards of 28 U.S.C. § 455. Section 455 provides for the disqualification of a federal judge "if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *In re Manoa Finance Co.*, 781 F.2d 1370, 1372-73 (9th Cir.1986) (quoting *Sakellar v. Lockheed Missiles and Space Co.*, 765 F.2d 1453, 1457 (9th Cir.1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 856, 88 L.Ed.2d 896 (1986)). Plaintiffs speculate that the motive for Judge

[16] A few evidentiary objections may have been sustained in error, although plaintiffs have not challenged them specifically. We are convinced that they did not work to harm plaintiffs. Thus, we refuse to upset the remainder of the district court's many, many correct and reasoned rulings. It also appears that on occasion Judge Real lost his patience when Yagman declined to answer a direct question or admitted a lack of preparation. We find nothing extraordinary in this, however, that would justify a finding that Judge Real was improperly biased.

Real's alleged bias may have been due to the fact that Yagman was scheduled to testify against the judicial nomination of a colleague of Judge Real. Plaintiffs posit that Judge Real may have found out about the scheduled testimony, snatched this action from Judge Lydick's calendar, and reset the trial so as to conflict with Yagman's scheduled testimony. There is no evidence in the record whatsoever to support this theory, however. On the contrary, when the beginning trial date of April 3 was first suggested, Yagman noted that he had another trial starting on April 10, but made no mention of his April 6 scheduled testimony. (Reporter's Transcript, Mar. 20, 1984, pp. 12-13). The first mention of the scheduled testimony came on the second morning of trial when Yagman suddenly asked to be excused from trial for that reason. The court refused to rule on the request at that time,[17] and the point became moot when the trial ended prior to the time Yagman was scheduled to testify.

---

[17] The following exchange occurred:

> MR. YAGMAN: I would like the Court's permission to be excused on Friday afternoon so that I can testify against Judge Lucas at the hearing of the Commission on Judicial Appointments between 1:30 and 3:00 o'clock on Friday afternoon.
>
> THE COURT: Well, I don't know that that's a reason to be excused from this case. I guess you have a First Amendment right to do that, Mr. Yagman, but I don't know that we have to accommodate that necessarily. You put this Court in a position, which you like to do, Mr. Yagman, and that is, if I should deny you that privilege, what you are telling me is, I am doing it because he happens to be a judge of this court. I know how you operate, Mr. Yagman. So please don't do that to me.
>
> MR. YAGMAN: May I have permission to—
>
> THE COURT: I am not ruling on anything. Bring in the jury.

(Reporter's Transcript, Apr. 4, 1984, pp. 4-5).

We conclude, therefore, that plaintiffs were not denied a fair trial and an impartial judge.[18]

F. SANCTIONS

Immediately after directing the verdict and dismissing the jury, the district court suggested "to the defendants that they may have a Rule 11 sanctions motion since there may be a very, very serious problem of good faith." (Reporter's Transcript, April 5, 1984, p. 21). The defendants responded with a motion for sanctions in the amount of $250,000.00. Following a hearing at which Yagman was represented by counsel, the court imposed sanctions against Yagman and his professional corporation, Yagman & Yagman, P.C., in the requested amount, based on the authority of Rule 11, section 1927, and Local Rule 27.1. Yagman vigorously contests the validity of these sanctions in all respects.

1. *Procedure*

Initially, Yagman compares the instant sanction proceedings to criminal contempt and argues that "it was a denial of due process as well as a violation of [section] 455 for Judge Real to fail to disqualify himself" from the sanction proceedings. (Yagman's brief at 32). We have recognized that, generally, monetary sanctions, which derive from a failure to carry out the special responsibility an attorney has in the judicial process, differ

> from the more severe infractions of criminal contempt for which attorneys and members of the general public can become liable. The former is an unjustified failure to carry out an administrative

---

[18] To the extent, if any, that plaintiffs lacked a "day in court," it was most likely due to an abandonment of that day by plaintiffs' counsel. Yagman did not, for example, present an opening statement, nor did he argue against the motion for directed verdict. In addition, Yagman, on occasion, admitted being unprepared and refused to answer direct questions from the court.

responsibility as an officer of the court; the latter is an affront to the authority of the judge.

Miranda v. Southern Pacific Transportation Co., 710 F.2d 516, 521 (9th Cir.1983); *see also Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 566 (3d Cir.1985). It is nevertheless possible for a monetary sanction to assume the criminal character of a fine. For example, if the amount of the sanction imposed is grossly disproportionate to the attorney's misconduct or otherwise falls outside the bounds of the authority for the sanction, then the court should be cognizant of the possibility of a latent fine. If, in addition, the record reflects that the judge imposing the sanction has been the target of the sanctioned attorney's vilification or was otherwise personally embroiled with the attorney during the trial, the suspicion is intensified and the court must carefully assess the circumstances to determine if additional due process safeguards are called into play.

In the case at bar, we are convinced, after a thorough review, that due process concerns have been fully satisfied. Admittedly, $250,000.00 is a remarkably large monetary sanction—large enough to raise immediate suspicion. That amount, however, is purported to be less than the total attorney's fees expended in defense of this action. The three rules cited by the district court as authority for the sanctions all provide for the award of attorney's fees.[19] Ostensibly, therefore, if we assume for the mo-

---

[19] As amended in 1983, Rule 11 provides:

> Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best fo his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing

ment that the district court is correct in its findings about the applicability of these rules to this case and about the reasonableness of the amount itself, the mere size of the sanction does not transform it into a criminal fine because attorney's fees are specifically authorized as a measuring rod. Further, we do not find in the record the type of personal embroilment or derogatory attacks leveled at Judge Real that would ordinarily carry such potential for bias as to require disqualification as a matter of due process. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66, 91 S.Ct. 499, 504-05, 27 L.Ed.2d 532, 540 (1971); *Flynt*, 756 F.2d at 1366 n. 13, *as modified*, 764 F.2d 675 (9th Cir.1985). We conclude, therefore, that due process concerns did not mandate that a different judge preside over the sanctions proceedings.

We also reject the contention that Judge Real erred by not *sua sponte* disqualifying himself for bias under sec-

---

law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. § 1927 provides:

Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Local Rule 27.1 provides:

Penalty—Violation of Rule—Violation of or failure to conform to any of these Local Rules, the F.R.Civ.P., F.R.Crim.P., or F.R.App.P., shall subject the offending party or counsel to such penalties, including monetary sanctions and/or the imposition of costs and attorney's fees to opposing counsel, as the Court may deem appropriate under the circumstances.

tion 455. As we have discussed, there is no support in the record for the claim that Judge Real was personally biased or prejudiced against Yagman. The invidious motive articulated by Yagman is entirely speculative. Further, although it is obvious that Yagman and Judge Real clashed several times during the trial over various objections, evidentiary matters, and rule violations, we find none of it remarkable enough to indicate a need for Judge Real to disqualify himself from deciding the issue of sanctions. A judge may impose sanctions such as those at bar on his or her own initiative. When this occurs, the judge will obviously be dissatisfied with some aspect of the offending attorney's conduct. Often the judge may be angry with the attorney for violating one or more rules. Without more, this natural responsive attitude does not provide reasonable grounds to question the judge's impartiality, either because of the appearance or the fact of bias or prejudice, in presiding over the sanctions proceeding.

> [T]he negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct[.]

United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). We cannot find, on this record, reasonable grounds to question the impartiality of Judge Real in presiding over the issue of sanctions in this case. Consequently, we hold that Judge Real did not err in failing *sua sponte* to recognize obvious grounds for recusal and to grant recusal pursuant to section 455. *See United States v. Sibla*, 624 F.2d 864, 868 (9th Cir.1980).

2. *Merits*

We turn next to the substantive questions that surround the imposition of sanctions in this case. In its written opinion, the district court detailed numerous examples of Yagman's conduct and concluded that Yagman pursued this action vexatiously and in bad faith from beginning to end. In the court's concluding words:

> Yagman's conduct from the outset was violative of the Rules and common sense. His filing of the lawsuit was violative of Rule 11, F.R.Civ.P. [sic]. His unreasonable and vexatious conduct in the prosecution of the action from the onset multiplied the proceedings totally out of proportion, in violation of 28 U.S.C. § 1927. His total conduct calls for sanctions pursuant to Local Rule 27.1. It is difficult to conceive of a case more subject to sanctions upon an attorney than this one.

(C.R. 279 at 18). By reason of this bad faith conduct, the court further found, defendants were required to incur expenses in excess of $293,000.00. Because defendants only requested sanctions in the amount of $250,000.00, however, the district court imposed sanctions upon Yagman in that amount, noting that the lower sum "takes well into account any previous sanctions paid by Yagman." (C.R. 279 at 18).[20]

As judges, we are particularly sensitive to the problem of, and widespread concern over, frivolous litigation and the abusive practices of some attorneys. "These practices tend to impose unjustified burdens on other parties, frustrate those who seek to vindicate their rights in the courts, obstruct the judicial process, and bring the civil justice system into disrepute." Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182 (1985). *See also Carlucci v. Piper Air-*

---

[20] Yagman was sanctioned on at least two previous occasions in connection with discovery abuses in this case.

craft Corp., Inc., 775 F.2d 1440 (11th Cir.1985). Fairness to litigants who suffer from such abuse, and others in the case load queue, depends in large part upon reducing the reluctance of lawyers to seek and judges to impose sanctions in proper circumstances. At the same time, we embrace the fact that zealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process. None of the various rules and statutes that authorize sanctions are intended, nor should they be implemented, "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *See* Proposed Amendments to Fed.R.Civ.P. 11, Advisory Committee Notes, 97 F.R.D. 198, 199 (1983).

The line between these equally important concerns is necessarily vague. Each case must be taken individually and evaluated in light of its own peculiar circumstances. If sanctions are warranted by those circumstances, the court should not waiver in imposing them. In so doing, however, the court must be meticulously aware that this precarious balance can only be maintained if the sanctions are justly imposed. This means foremost that the conduct in question must in fact be sanctionable under the authority relied upon. It also means that the amount of the sanctions and the manner in which they are imposed cannot be inconsistent with the purpose and directive of the authority on which the sanctions are based. We must reverse the instant sanctions award because it does not fall within these guidelines and, therefore, poses a direct threat to the balance between sanctioning improper behavior and chilling vigorous advocacy. We will discuss first the problems with this sanctions award in terms of the amount and the manner in which it was imposed. Second, we will analyze the suitability of these sanctions under each of the three sources of authority cited by the district court and in the context of the particular misconduct attributed to Yagman.

As previously noted, Judge Real took over responsibility for this action only one week before trial. Many of Yagman's actions noted by Judge Real in imposing sanctions occurred when Judge Lydick was presiding. During that time, Yagman was in fact sanctioned for some discovery abuses, but only when requested by opposing counsel. In addition, the complaint withstood several motions for summary judgment in front of Judge Lydick. The procedure utilized by Judge Real in imposing sanctions, therefore, was essentially an accumulation of all perceived misconduct, from filing through trial, with a reevaluated determination that it was far more serious than appeared at the time. The result of this procedure is a single post-judgment retribution in the form of a massive sanctions award.

The most obvious defect in this procedure is that it flies in the face of the primary purpose of sanctions, which is to deter subsequent abuses. This policy is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions. Such "prompt action helps enhance the credibility of the rule and, by deterring further abuse, achieve its therapeutic purpose." Schwarzer, *supra* at 198. Moreover, the accumulation procedure used at bar "tends to perpetuate the waste and delay which the rule[s are] intended to eliminate." *Id.* We are convinced that the magnitude of the sanctions in this case is directly related to the use of this procedure. Abuses were allowed to pass unchecked and, thus, undeterred, and attorney's fees were allowed to accumulate. As a consequence, we are left faced with an unusually large sanctions amount that will, contrary to the policy, impart absolutely no deterrent value to this case. It appears the efficiency achieved by levying two years' worth of sanctions in one post-trial

lump has been paid for in wasted judicial resources and money.

By this, we do not condemn as inappropriate in all cases the procedure of withholding the sanctions decision until the end of trial. In some situations, liability under proper sanctioning authority will not be immediately apparent or may not be precisely and accurately discernible until a later time. For example, findings under Rule 11 occasionally cannot be made until after the evidentiary portion of the trial. A claim may appear to raise legitimate and genuine issues before trial, even in the face of summary judgment challenges, but will be unmasked as not well-founded in fact after the claimant has presented his evidence. And, in some cases, not until after the defendant's case-in-chief. The court must be able to respond to these situations with appropriate sanctions in the hope of deterring future inadequate filings by the certifying attorney and the trial bar in general. On the other hand, in situations where a complaint or other paper is obviously and recognizably frivolous when filed, or as circumstances lead the court to strongly suspect that a filed paper may not be well-grounded in fact or law, the court should *at a minimum* provide notice to the certifying attorney that Rule 11 sanctions will be assessed at the end of trial if appropriate. Such early notice in cases of this nature will serve to warn the attorney that he risks incurring substantial sanctions, which will in turn increase the likelihood that meritless claims and motions will be abandoned and additional monetary and judicial resources will be saved. This procedure administers the paramount aim of deterrence and, simultaneously, eliminates the danger of an unsuspected punitive award.

In contexts other than Rule 11, the sanctionable misconduct will, in general, be more immediately recognizable. Consequently, if the purposes of the rules are to be served, the sanctionable behavior should be brought to

the immediate attention of the offending attorney. In the event of discovery abuses and other vexatious pre-trial behavior, for example, sanctions should be levied contemporaneously with the offending misconduct. The benefit provided by the policy of deterrence is lost if the court postpones imposition until the end of the case. Further, in situations of attorney misconduct occurring during a hearing or trial, the offending attorney should be put on clear and fair notice of possible liability at, or very near, the time that the egregious behavior occurs. We believe it is preferable, however, to reserve final judgment, fixing the amount of the sanctions, until the conclusion of the hearing or trial, as is often done in contempt cases. Such a procedure permits the court to consider, in fixing the amount, the subsequent conduct of counsel and does not divert an attorney from the representation of his client.

It is neither appropriate nor possible for us to address every conceivable situation calling sanctions into play. The circumstances presented in each situation will, quite naturally, be unique and may vary widely. To a certain extent, the optimum timing of the sanctions award will depend on those circumstances. It is critical, however, that the sanctioning court embrace the overriding purpose of deterrence and mold its sanctions in each case so as to best implement that policy. Effective and sound judicial management includes the duty to impose just sanctions, where appropriate, in a manner which will best advance the underlying goal. The procedure used at bar failed in this respect.

In a related vein, we are convinced that the amount of sanctions imposed is not sound. It is clear that the position taken by Judge Real was that substantially all fees incurred by defendants were attributed to Yagman's misconduct. We find that this "round-figure" approach is inadequate. Sanctions must be "reasonable" in amount. This is particularly so where, as here, the amount of the

sanction is based upon the attorney's fees claimed by the other party. It is difficult to assess the reasonableness of lump-sum sanctions award, such as this one, which is intended to cover a myriad of misconduct over a period of time and is based upon a variety of authority. The task becomes impossible when the amount of the lump-sum sanctions award assumes massive proportions.

It is crucial, therefore, that a sanctions award be quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority. Different rules, regulations and statutes provide sanctions for different forms of misconduct. For example, section 1927 provides for the recovery of the *excess* attorney's fees incurred as a result of misconduct which multiplies the proceedings. *United States v. Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1347-48 (9th Cir.1985); *see also Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829-30 (9th Cir.1986). Obviously, a blanket award of all fees cannot square with the section's requirement that only excess amounts be allowed. Thus, only if the award is sufficiently itemized can the court be assured that it is reasonable.

When the sanctions award is based upon attorney's fees and related expenses, an essential part of determining the reasonableness of the award is inquiring into the reasonableness of the claimed fees. Recovery should never exceed those expenses and fees that were reasonably necessary to resist the offending action. Schwarzer, *supra* at 198. There is no need to rigidly apply the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), but the court must make some evaluation of the fee breakdown submitted by counsel. *Toombs v. Leone*, 777 F.2d 465, 472 (9th Cir.1985). The measure to be used "is not actual expenses and fees but those the court determines to be reasonable." Schwarzer, *supra* at 203. Implicit in this is the duty to mitigate.

> In assessing the damage done, the court should consider the extent to which it is self-inflicted due to the failure to mitigate. . . .
>
> . . . .
>
> . . . A party having vigorously resisted a baseless claim may therefore find that the court, in making an award, will consider its expenditures to have been excessive.

Schwarzer, *supra* at 200-03. Further, as we have recently noted, Rule 11 "sanctions are not appropriately awarded for any portions of attorney's fees provoked by a moving attorney's misconduct." *Mossman v. Roadway Express*, 789 F.2d 804, 806 (9th Cir.1986), *as amended*.

The district court's award in this case fails in all of these respects. Not only does the court's lump-sum award contravene the policy of deterrence underlying sanctions, it also fails as a post hoc award because it makes no attempt to itemize and quantify the sanctions. Nor does the court purport to scrutinize the $293,000.00 in fees and expenses that defendants claim to have incurred in fighting a lawsuit which they contend was frivolous from the start. Nor does the court consider any misconduct on the part of defense counsel which may have contributed to the protraction of this lawsuit.[21] In addition, the

---

[21] In response to a pre-trial motion by plaintiffs for sanctions, Judge Lydick ruled:

> . . . defendants' counsel's actions may appear somewhat bizarre, including but not limited to his refusing to serve plaintiffs with the video tape which it seeks to introduce into evidence, but offering to sell a copy of the video tape to plaintiffs instead —and we admonish counsel to comply with Local Rule 7.5.1 regarding the service of evidence and all other applicable rules.
>
> However, plaintiffs' request for attorneys' fees is denied if for no other reason that if this Court were to sanction that remedy in this case on every occasion that it is asked for by these attorneys, the Court would be turned into a veritable counting house.

(Reporter's Transcript, Oct. 31, 1983, p. 6).

award entirely fails to consider Yagman's ability to pay such an immense sum which, in our view, is another factor relevant in determining reasonableness. *See Colucci v. New York Times Co.*, 533 F.Supp. 1011, 1013 (S.D.N.Y.1982). In short, the district court does not appear to have determined in any way whether the sanctions award complies with the reasonableness requirement and, thus, we hold that the award constitutes an abuse of discretion. By this holding, we do not condone any of Yagman's misbehavior. After reviewing the entire record, we empathize with the district court's desire to punish Yagman's actions. To allow that punishment, however, to take the form of such a generic, all-encompassing, massive, post-trial retribution, with no indication whatsoever of reasonableness, would send shivers through the bar.

We also disagree with the district court's application of Rule 11, section 1927 and Local Rule 27.1 to this case, beginning with the court's express finding that Yagman's filing of this complaint was a violation of Rule 11. Yagman argues that the district court erroneously applied the amended Rule 11, when instead the old rule that was in effect at the time the complaint was filed should have been used. Rule 11 was in fact amended during the pendency of this lawsuit and the differences between the two versions of the rule are significant. First, old Rule 11 was governed by a standard of willfulness and subjective bad faith, while the amended Rule 11 utilizes a more stringent standard of objective reasonableness. *Zaldivar*, 780 F.2d at 829. Second, unlike its counterpart, amended Rule 11 expressly provides for sanctions based on a reasonable attorney's fee. *Compare United States v. Standard Oil Co. of California*, 603 F.2d 100, 103 n. 2 (9th Cir.1979), *with Mossman v. Roadway Express*, 789 F.2d at 806. Logically, because the charge of both versions of the rule speaks to the time of signing and filing, the older and less harsh Rule 11 should govern this complaint since it was in effect at that time. It would be

unfair to saddle Yagman with the additional responsibility and greater liability mandated by the amended rule, which only came into being after the complaint was filed. *See Bradley v. Richmond School Board*, 416 U.S. 696, 720-21, 94 S.Ct. 2006, 2020-21, 40 L.Ed.2d 476, 493 (1974) (application of an old rule is preferred if the new rule imposes unanticipated obligations or increased burdens on the party); *Burgess v. Premier Corp.*, 727 F.2d 826, 840 (9th Cir.1984) (attorneys' fees would not be awarded for conduct not actionable under law at the time of the complaint).

Thus, the district court erred in applying amended Rule 11 in this case.[22] That error is, by itself, of no great consequence, since the district court found that the complaint was filed in bad faith. A finding of bad faith will, if correct, support sanctions under either version of Rule 11. In our view, however, the court's bad faith finding is clearly erroneous.[23] The bad faith finding appears to be based upon three more specific findings made by the district court. In our opinion, these underlying findings do not, either singly or collectively, support a conclusion of bad faith.

First, the court found that Yagman and the plaintiffs had little or no knowledge of the actual statements made by defendants before filing the complaint. Knowledge

---

[22] Although the district court did not elucidate which version of Rule 11 it was applying, we can assume the amended rule was used for two reasons. First, it was the rule in effect at the time of decision and was thus presumptively applied. Second, the large sanction award of attorney's fees would be proper, if at all, only under the amended rule.

[23] We review the factual findings relied upon by the district court to establish a violation of the rule under the clearly erroneous standard. We review the district court's legal conclusion that the facts constitute a violation of the rule *de novo*. We review the appropriateness of the sanction imposed for an abuse of discretion. *Zaldivar*, 780 F.2d at 828.

of the actual statements, however, is irrelevant and often impossible in slander cases. What is important is that publication to someone other than the plaintiff be made. The allegedly defamatory statements in this case were undisputedly uttered to persons other than plaintiffs and there is ample evidence that Yagman and the plaintiffs were well aware of the essence of those statements.[24] Further, complaints are routinely filed on information and belief. A finding of bad faith for doing so in this case is clearly wrong.

Second, the court concluded that Yagman filed this suit for a two-fold improper purpose of silencing expert witnesses and obtaining a discovery advantage in the underlying Settles civil suit. The plain facts, however, refute both of these purported purposes. The civil suit was filed over six months before the instant defamation action and discovery in the civil suit was progressing during that time. We frankly do not understand, nor is it evident from the record, what discovery advantage would be possible by the filing of this lawsuit. Further, the complaint challenged only extra-judicial, allegedly false, statements of fact. As such, it might chill a witness's zeal to hold a press conference, but it could not "silence" the testimony of these witnesses in any judicial proceeding.

Third, the district court held that Yagman should have recognized that the alleged defamatory statements were non-actionable opinion. Although we have upheld the district court's finding that the statements were indeed protected opinion, we do not consider the distinction between fact and opinion to be so clear that merely filing a complaint in these circumstances permits a finding of

---

[24] Plaintiff Brown testified that he learned of the doctor's statements when media representatives began contacting him on the day of the press conference. Witness and fellow attorney Inlow Campbell testified that he attended the press conference and told Yagman about it later that day.

subjective bad faith. From the plaintiffs' perspective, after being the focus of intense scrutiny and suspicion that they were responsible for Settles' death, a good faith argument can be made that defendants' statements should not be constitutionally protected. The argument need not be correct to be considered made in good faith.

Consequently, we find no basis for Rule 11 sanctions for the signing of the complaint. Nor do we find a basis for such sanctions in the other two authorities relied on by the district court. Local Rule 27.1 authorizes the imposition of monetary sanctions against an attorney who violates any local or federal rule. Since the complaint was proper under Rule 11, it could not be improper under Local Rule 27.1. Section 1927 does not apply to initial pleadings, since it addresses only the multiplication of proceedings. It is only possible to multiply or prolong proceedings after the complaint is filed. *Zaldivar*, 780 F.2d at 831.

The district court also details a significant number of acts and omissions committed during the pre-trial phase of the case. They generally fall into two categories: (1) discovery abuses; (2) failure to prepare or otherwise cooperate in Rule 16 management.

Yagman committed a number of discovery abuses, such as failure to produce and refusal to answer deposition questions. Sanctions for discovery abuses are governed primarily by Rule 26(g) and Rule 37, rather than Rule 11, of the Federal Rules of Civil Procedure.[25] These rules are sufficiently comprehensive to leave no room for a discovery abuse sanction based upon a local rule violation. Also, section 1927 is not appropriate for use in these circumstances. Sanctions under Rules 26 and 37 come into play when there is a violation of the rules, as

---

[25] Discovery motions made after August 1, 1983 fall within the ambit of amended Rule 11. *See* Advisory Committee Notes, 97 F.R.D. 198, 201 (1983).

at bar; damages under section 1927 are appropriate where there is no obvious violation of the technical rules, but where, within the rules, the proceeding is conducted in bad faith for the purpose of delay or increasing costs. Thus, while authority existed under Rules 26 and 37 to punish Yagman for discovery abuses, as was done on occasion, it did not exist under the authority used by the district court.

Rule 16(f), Fed.R.Civ.P., provides for sanctions, including a reasonable attorney's fee, for failure to prepare for scheduling conferences and failure to cooperate in pretrial orders. Rule 11 does not apply in this situation. Further, Rule 16 is narrower than Local Rule 27.1, which authorizes monetary sanctions for the violation of any federal rule, whether the federal rule itself authorizes sanctions or not. In our view, the sanctions imposed by the district court may have been sustainable under Rule 16, but not Rule 27.1. Finally, section 1927 might be a basis for imposing sanctions for the failure of Yagman to prepare, but there has been no showing how any such failure resulted in a delay or multiplication of the proceedings. The court and defense counsel were obviously exasperated by Yagman's "cavalier" conduct, but section 1927 sanctions must be based upon a more particular showing consistent with the force and purpose of the statute.

The district court further purported to sanction Yagman for his conduct at trial. The conduct of counsel during the course of trial has not been made the subject of a formal set of rules. Of course, the rules of evidence and various local rules regarding counsel conduct may be relevant, as well as the whole range of ethical obligations of an attorney. In any event, the district court did not point to specific rules which Yagman violated during the course of the trial. Rather, the court is critical of Yagman's tactical decisions, lack of preparation, groundless objections, and incessant quibbling. After re-

viewing the record, we sympathize with the court's reaction to Yagman's trial conduct but, under the circumstances, we must regard it as merely the last straw, following a pre-trial history of offensive and obstreperous conduct.

The court cannot, as it purported to do, sanction Yagman's "total conduct" under Local Rule 27.1. Reference to specific federal rule violations must be made. Nor can the court sanction trial conduct under section 1927 without more specific findings as to the exact misconduct which multiplied the proceedings and the amount of "excess costs, expenses, and attorney's fees" occasioned by the misconduct. We note further that Rule 11 sanctions are obviously inappropriate in this context, and the district court did not purport to exercise its contempt powers or invoke sanctions based upon its inherent power to punish abusive litigation practices. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

Consequently, we reverse the district court's sanctions award against Yagman. On remand, the court may reconsider whether any of Yagman's actions during the trial warrant sanctions under a proper exercise of sanctioning authority. Obviously, Rule 11 sanctions for the filing of this complaint should not be reconsidered and it is too late in the day to impose sanctions for Yagman's pretrial conduct.[26]

Yagman has requested that the action be remanded to a different district judge. This type of relief is exceedingly rare. "In the absence of proof of personal bias, we remand to a new judge only under 'unusual circumstances.'" *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 780 (9th Cir.1986) (citations omitted).

---

[26] By this decision we are not deciding the propriety of a *respondeat superior* sanctions award against the professional corporation.

We have firmly rejected Yagman's claims of judicial bias and, thus, are hesitant to grant this extraordinary relief. We do not doubt Judge Real's ability to act fairly. We grant this relief, however, because we believe it is necessary to preserve the appearance of justice. This case has had an unbecoming quality from its beginning. We do not appreciate nor condone the attorney bickering and misconduct which has pervaded the action and which spawned the district court's ire. Nevertheless, the massive sanction award and the numerous allegations of bias and overreaching have combined with this poor lawyering to produce an entirely unfortunate end result: the fragile appearance of justice has taken a beating. It is time to conclude the matter as quickly and as painlessly as possible. We feel this can best be accomplished by a new, randomly selected judge. Because the question on remand is limited, any duplication of effort and waste will be minimal.

AFFIRMED IN PART and REVERSED IN PART and REMANDED with instructions that this case be randomly reassigned.

Each party to bear its own costs.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5957

DC No. CV 82-3268-R

IN RE: MATTER OF STEPHEN YAGMAN,
Appellant,

JERRY BROWN and GERRY FLEISCHER,
Plaintiffs/Appellants,

vs.

MICHAEL BADEN and SIDNEY WEINBERG,
Defendants/Appellees.

[Filed Nov. 17, 1986]

Appeal from the United States District Court
for the Central District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part, & remanded with instructions that this case be randomly reassigned. Each party to bear its own costs.

A TRUE COPY

ATTEST Nov. 13, 1986

CATHY A. CATTERSON
Clerk of Court

by: /s/ Ernesto M. Cruz
ERNESTO M. CRUZ
Deputy Clerk

Filed and entered August 13, 1986

APPENDIX H

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 84-5957

IN RE: MATTER OF STEPHEN YAGMAN,
Appellant,

JERRY BROWN and GERRY FLEISHER,
Plaintiffs,
v.
MICHAEL BADEN and SIDNEY WEINBERG,
Defendants-Appellees.

Nov. 6, 1986

Stephen Yagman, Los Angeles, Cal., pro se.

Ramsey Clark, New York, for plaintiffs.

Harry Schneider, Woodland Hills, Cal., Anthony A. De Corso, Mark E. Beck, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States Distirct Court for the Central District of California.

Before ANDERSON, PREGERSON, and WIGGINS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

With this order, the slip opinion filed August 13, 1986 [796 F.2d 1165], is amended by adding a new footnote 26, on page 46 [p. 1188] at the end of the second sentence in the second full paragraph ending with "sanctioning authority," and renumbering footnote 26 at the end of the paragraph to be footnote 27, as follows:

> "Nothing we have said in this opinion should be construed to impair in any way, nor to preclude, an award based on bad faith conduct under the court's inherent power, if found to be appropriate. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752 [100 S.Ct. 2455, 65 L.Ed.2d 488] (1980)."

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 82-3268-R

JERRY BROWN and GERRY FLEISHER,
Plaintiffs,

v.

MICHAEL BADEN and SIDNEY WEINBERG,
Defendants.

[Filed June 20, 1984]

OPINION

Defendants have brought a motion to assess sanctions against Stephen Yagman (Yagman) and his professional corporation for vexatious and bad faith conduct in the filing and prosecution of this action. The motion is brought on several alternative grounds, i.e., violation of Rule 11, F.R.Civ.P., 28 U.S.C. § 1927, and Local Rule 27.1.

This litigation has cost the defendants in excess of $293,000. It lacked good faith from the beginning. It was pursued vexatiously from the filing of the complaint through the trial. The sanctions herein imposed are proper under each of the provisions of federal law providing for the sanction of attorneys' fees and costs.

Ronell Settles (Settles) died by hanging in the Signal Hill jail. As the result of Settles' death the Settles

family filed a lawsuit in this court entitled *Settles v. City of Signal Hill,* (CV-81-6437-FW).

As part of the preparation of the *Settles* case the Settles family had the interred body of Settles re-autopsied by defendants Michael Baden (Baden) and Sidney Weinberg (Weinberg). Participating in the re-autopsy were Dr. Thomas Noguchi (Noguchi) the Medical Exemainer-Coroner of Los Angeles County, and Dr. Werner Spitz, the Medical Examiner-Coroner of Wayne County, Michigan.

After the re-autopsy had been completed the Medical Examiners held a press conference on June 26, 1982 in which they each expressed their opinion of the findings of the re-autopsy and the apparent cause of death of Settles. This press conference was held in Hauppauge, New York. The statements made by Baden and Weinberg were never published in California.

Yagman's knowledge of the statements made by Baden and Weinberg was minimal at best. The evidence at trial and in the files of this court would lead anyone to conclude that Yagman's knowledge was, in fact, nonexistent.

Yagman filed this suit against Baden and Weinberg for defamation with this minimal or nonexistent knowledge and prosecuted it to trial with what must be concluded from the files to be a twofold purpose—(1) to silence expert witnesses and (2) obtain discovery advantage in the *Settles* case. This conclusion derives from the fact that Yagman's clients, the plaintiffs in this suit, did not have personal knowledge of what defendants had said about the re-autopsy, nor had Yagman ever advised his clients of what had been said. Plaintiffs first learned of the contents of the press conference on June 26, 1982 when they viewed a videotape at trial on April 3, 1984. Mr. Yagman himself had not seen the videotape of the press conference until some six months before trial. Even after viewing the videotapes, Mr. Yag-

man persisted in proceeding with the case even though he then had to know that Baden and Weinberg had simply stated their findings as Medical Examiners without accusations of any sort against any person or persons.

Yagman's conduct during the pretrial procedures and trial of this matter was equally vexatious.

On February 9, 1983, counsel for defendants addressed a Request for Production of Documents for plaintiffs to produce on March 21, 1983 at 9:30 A.M. Yagman failed to appear in response to the Request. He failed to respond in writing as required by Rule 34(b) of the Federal Rules of Civil Procedure. Again Yagman failed to meet as required by Local Rule 3.15.1 (now 7.15.1).

Defendants' counsel were required to file a motion to compel production. The motion was granted together with an assessment of attorneys' fees and costs.

On February 24, 1983, Yagman's deposition was noticed to question him because he claimed to be a percipient witness to defamatory statements made by Baden and Weinberg. When asked whether he had tape recorded a meeting at which he alleged Baden had made defamatory remarks concerning the plaintiffs, Yagman answered:

> "A I won't answer that question.
>
> "Q Can you state your reason, please.
>
> "A I don't know. My gut reaction is that it is an improper question, but I would have to do some research to determine whether or not an objection properly can be interposed.
>
> And I would be happy to look into that and then either give you the answer to the question under penalty of perjury in a declaration by saying yes or no or giving you the legal basis for my refusal to answer."

Local Rule 3.15.1 (now 7.15.1) requires a conference of counsel to settle discovery disputes before a motion to compel can be brought before the court. Mr. Yagman did not attend the required conference to settle the discovery dispute, but sent a lawyer who shares office space with him, who knew nothing of the case and simply read a prepared statement. The failure of the conference, and an unanswered proposed stipulation sent to Yagman, required the defendants to file a motion pursuant to Local Rule 3.15.2 (now 7.15.2) to compel him to answer. The motion was withdrawn by defendants only after Yagman filed a declaration under penalty of perjury that he had not taped the meeting. Yagman's response to this act was "this motion was precipitously filed, was not opposed and was not granted." It was not granted because of Yagman's belated capitulation to an obviously relevant inquiry on discovery. Yagman's gratuitous response to his failure to appear was "the attorney who attended the meeting was familiar with the case, the dispute was resolved and such a resolution could not be vexatious." This is a statement made without the appreciation of the cost to defendant in compelling an answer by motion after an abortive attempt to resolve the dispute according to the rule.

On February 24, 1983, the deposition of plaintiff Jerry Brown (Brown) was commenced. On the advice of Yagman, Brown refused to answer clearly relevant questions. This action required a Local Rule 3.15.1 conference. Yagman failed to appear. The questions involved were so obviously relevant that Magistrate Geffen granted the motion to compel answers and sanctions at the hearing of May 2, 1983.

A dispute arose over production of plaintiffs' personnel records. This time Yagman requested a Local Rule 3.15.1 (now 7.15.1) meeting. Although demanding the meeting, with knowledge that neither he nor defendants' counsel had any control over the production of the per-

sonnel records of police departments when they objected to production, Yagman failed to appear at the meeting without notice or excuse.

Yagman filed a motion for hearing on May 2, 1983, which inter alia, requested a determination that plaintiffs (police officers) were not public figures, without citation of authority except his own declaration that "in my professional opinion, neither plaintiff is a public figure." The judge hearing the matter (Judge Lydick) opined, ". . . this is without doubt the most unmeritorious motion I have had occasion to review in eleven years on the bench," and, further, "If defendants had sought sanctions for the bringing of this worthless motion, they would have been granted."

A motion to compel further answers to interrogatories was granted June 14, 1983, together with the imposition of sanctions. On June 20, 1983, another order to answer the interrogatories requiring the answers ordered on June 14, 1983 was required with sanctions again imposed on Yagman.

Local Rule 8.2.3 (formerly 6(b)) provides:

> 8.2.3 Interrogatories and Requests for Admissions —Answers and Objections—The party answering or objecting to interrogatories or requests for admissions shall quote each interrogatory or request in full immediately preceding the statement of any answer or objection thereto.

In answer to the interrogatories served by defendants' counsel on March 8, 1983 and June 7, 1983, Yagman simply Xeroxed the interrogatories and typed or hand printed the response, in violation of Local Rule 8.2.3. Yagman's response to that was a literary shrug of the shoulder answer, "My use of cost efficient methods of responding." Further, Yagman's responses and objections to the interrogatories of June 7, 1983 were frivolous.

Yagman signed verification on July 25, 1983 of Plaintiffs' Responses to Defendants' Third Set of Interrogatories. On August 8, 1983 he executed a Declaration in Opposition to Defendants' Discovery Motion in which he stated, "On July 2, 1983, I left the United States and did not return until July 31, 1983." Yagman has not yet explained the inconsistency of these two declarations made under penalty of perjury.

Yagman's failure to comply with the order of July 14, 1983 to provide further and specific answers to defendants' interrogatories covering autopsy reports required another court order on August 16, 1983.

On August 26, 1983 Yagman was ordered to prepare a stipulation concerning the autopsy reports to be used. That order was based on a stipulation by Yagman and counsel for defendants that Yagman would draw up a stipulation by September 9, 1983. Yagman failed to do it. His response was cavalierly ". . . I had informed the court and Mr. Schneider that these reports were Mr. Schneider's reports."

Although not a serious violation of Local Rules of Civil Procedure, Yagman's treatment of service of documents is indicative of Yagman's Burger King syndrome (Do it my way) in disregard of any modicum of adherence to the rules or orders of court. Yagman's Declarations of Service of documents in this case provide, "I served the attached papers . . . in sealed envelopes with full postage thereon prepaid in the United States Mail at Los Angeles, California, or by causing 1, 2, 3, Messenger Service to deliver said envelopes." Many of those declarations are without name or signature of the person serving the document. Time for response is impossible without knowledge of how the document was served.

Federal Rules of Evidence Rule 902 provides in pertinent part:

Rule 902 Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

* * *

(6) Newspaper and periodicals. Printed materials purporting to be newspapers or periodicals.

In spite of the clear meaning of Rule 902 (6), Yagman refused when requested to admit, in response to requests for admissions, the authenticity of defendants' proffered newspaper articles concerning plaintiffs and their connection with Settles' death. Yagman's response, ". . . it is impossible for plaintiffs to determine whether or not the actual article 'appeared' in the subject paper since plaintiffs do not have the original article nor have they been provided with the original article or any properly authenticating document." Such a cavalier approach to such an obviously reasonable request by counsel for defendants is just another classic example of vexatious conduct on the part of Yagman.

Plaintiffs (Yagman's clients) were requested to admit that "On March 24, 1982 defendants Weinberg and Baden, together with Dr. Thomas Noguchi and Dr. Werner Spitz, performed a reautopsy on the body of Reginald Ronell Settles." Yagman refused to admit that fact although he was personally present at the re-autopsy and had by then had in his possession the videotape of the press conference in which Drs. Weinberg, Baden, Noguchi and Spitz had rendered their opinions on the findings of the re-autopsy.

Yagman refused to admit to the accuracy of the videotape of the press conference (Exhibit 214) to announce the findings of the re-autopsy. Yagman's response in handwriting (violating Local Rule 8, formerly Rule 6)

was, "The tape is incomplete." Yagman, at trial, took a similar attitude. When pressed he agreed it fairly represented the press conference. More importantly, he offered no evidence that would indicate in any way the tape was "incomplete."

Local Rule 9 (9.4.4), implementing Rule 16, Federal Rules of Civil Procedure, requires the parties to exchange exhibits and documents to be used at trial. Yagman never provided the defendants with any documents or exhibits.

Yagman's witness list, required to be exchanged, simply was a Xerox copy of defendants' witness list with the addition of some names, although Yagman knew he would not be calling any or few if any of defendants' witnesses.

The trial of this matter epitomizes Yagman's total disregard of preparation to conduct this trial in good faith.

The trial commenced on April 3, 1984. When asked whether he was going to make an opening statement, Yagman's answer was, "I haven't decided yet, your Honor. I need about five minutes—." When asked again, his answer was, "No, I'm not, your Honor."

No lawyer is required to make an opening statement, but in my 18 years on the bench and 14 years of practice, I have never heard of a plaintiff's lawyer failing to make an opening statement in a jury trial.

After having declined to make an opening statement, Yagman later offered this so-called objection to the procedure employed by this court, to have opening statements made to the entire panel before placing anyone in the jury box.

> MR. YAGMAN: I think that is appropriate, your Honor.
>
> One other preliminary matter. I understood the Court to indicate that it is the intention of the Court to have the opening statement made to the entire

jury panel before the jury is selected and sworn; is that accurate?

THE COURT: That's right.

MR. YAGMAN: I would just like to, for the record, interpose the plaintiff's objection to that.

THE COURT: On what ground?

MR. YAGMAN: I haven't had an opportunity to research the matter yet, your Honor. I am interposing a general objection. This just happened this morning and I have never seen that procedure used before and I suspect that it may be defective.

THE COURT: Defective in what way, Mr. Yagman?

MR. YAGMAN: I don't know yet, your Honor, I—

THE COURT: In what possible way?

MR. YAGMAN: Your Honor, I don't make statements without doing research first, and I haven't done the research and I'm—

THE COURT: You shouldn't make objections without doing research either, Mr. Yagman."

This procedure is used to acquaint all panel members with the case. When empaneled, they are asked if there was anything they heard in the opening statement that would lead them to believe they could not fairly sit on the case.

The Court viewed the videotape before the trial started. In a colloquy concerning what statements were defamatory, Yagman made this statement:

"MR. YAGMAN: I should make one other point, your Honor. I have a tape of this proceeding and my tape is somewhat different than the tape I saw here this morning. There seems to be a few little snippets missing from this one and when I use the tape in the presentation of our case, I intend to use the tape which we have and not this tape."

In response to settle on one exhibit, this colloquy took place:

> "THE COURT: Well, what I suggest you do is both of you sit here and play the tapes so that you can agree that both tapes are the same or there are differences.
>
> MR. YAGMAN: I disagree.
>
> THE COURT: Mr. Yagman, I am ordering you to do that during the noon hour, so that we can have the accurate tape for the jury."

After the noon recess the Court inquired about the tapes, with this response:

> "MR. SCHNEIDER: Yes, your Honor. I believe that both tapes are identical.
>
> THE COURT: Mr. Yagman?
>
> MR. YAGMAN: I agree, your Honor."

Depositions are important at trial. Particularly the depositions of the plaintiffs. After counsel for defendants indicated some problem in getting plaintiffs' depositions signed, this colloquy took place:

> "THE COURT: All right. Do you have copies of all the depositions, Mr. Yagman?
>
> MR. YAGMAN: No, I don't, your Honor.
>
> THE COURT: Which one don't you have copies of?
>
> MR. YAGMAN: I don't know.
>
> THE COURT: Tell me now, Mr. Yagman. Don't give me this 'I don't know' business every time I ask you a question.
>
> MR. YAGMAN: I don't know the answer.
>
> THE COURT: Well then look at your depositions, the ones you have, and let's identify the ones that you don't have.
>
> MR. YAGMAN: I don't have them here, your Honor."

Yagman's cavalier attitude at trial is evidenced by this colloquy concerning his so-called objections to defendants' jury instructions:

"THE COURT:

* * *

Oh, incidentally, Mr. Yagman, while we are out of the presence of the jury, your objections to the defendants' proposed instructions, under what rule did you submit those objections? Mr. Yagman.

MR. YAGMAN: I don't know the numbers of the rules, your Honor.

THE COURT: Well, is there a rule that permits you to submit the objections in that form?

MR. YAGMAN: I don't know, your Honor."

The objections were apparently being made by Xeroxing defendants' instructions and crossing out, circling words and interlineation.

The colloquy continues:

"THE COURT: Well, did you read the rule concerning instructions and objections in the local rules?

MR. YAGMAN: I believe I did at some time.

THE COURT: Did you then read that you have to write—'Written objections shall be numbered and shall specifically specify distinctly the objectionable matter in the proposed instruction. Each objection shall be accompanied by citation of authority, where applicable, the objecting party shall submit an alternative instruction covering the subject or principle of law.'

And also Rule 51 [F.R.Civ.P.], which says that objections shall be stated distinctly, the matter to which he objects and the grounds for the objection.

MR. YAGMAN: I am certain I read that, your Honor.

THE COURT: Well then, you didn't do it. So take them back and do them properly.

* * *

THE COURT: Why didn't you serve it on counsel?

MR. YAGMAN: Your Honor, you are presuming it wasn't served on counsel.

THE COURT: Well, they didn't receive it. I assume—

MR. YAGMAN: That doesn't mean it wasn't served.

THE COURT: I beg your pardon?

MR. YAGMAN: That doesn't mean it wasn't served.

THE COURT: Well, when was it served then? Where is the affidavit of service?

MR. YAGMAN: It hasn't been prepared yet. It was served on the day on which it was filed.

THE COURT: To whom?

MR. YAGMAN: To opposing counsel.

THE COURT: Where?

MR. YAGMAN: Whatever their office addresses are.

THE COURT: You mean it was mailed to them?

MR. YAGMAN: Yes.

THE COURT: On April 2nd?

MR. YAGMAN: Yes.

THE COURT: They were going to be here in court, Mr. Yagman.

MR. YAGMAN: I don't know if they were going to be here in court, your Honor."

Mr. Yagman did not know counsel for defendants would be in court on the day of trial in a multimillion dollar lawsuit. The statement of it demonstrates the absurdity.

The record further demonstrates that Yagman's so-called objections to the instructions was filed on April

3, 1984 at 8:45 A.M. The docuemnt does not contain an affidavit of service on defendants and none has yet been filed.

The basic statement of defamation law is stated in Cal. Jur. III Vol. 6 at page 333. There it states:

> "The gist of such an action is injury to plaintiff's reputation or character . . ."

With this fundamental principle of law so easily available to Yagman he offered no evidence of injury to either of his clients' reputations or even if the so-called defamatory statements were never uttered in California.

Most egregious of Yagman's lack of good faith and vexatious attitude is his total disregard of the basic fundamentals of an attorney-client relationship. A cause of action belongs to the client and not the attorney. It is the client who must decide, under the circumstances of the facts and the legal consequences explained by his attorney, whether a cause of action should be filed. Yagman's clients were never aware, until trial (over two years later), of what had been said at the press conference on June 26, 1982.

On April 4, 1984, plaintiff Gerry Fleisher testified:

> "Q. Is it your testimony that you filed this lawsuit against Dr. Baden and Dr. Weinberg but had not known what they had said in its entirety until yesterday?
>
> A. Yes."
>
> Reporter's Transcript, Volume 2, page 2-9, April 4, 1984.

In February 1983, plaintiff Jerry Brown testified at his deposition:

> "Q. In what manner did whatever Baden and Weinberg said injure you in your profession as a law enforcement officer?

A. Say it one more time.
Q. (And then the question was repeated.)
A. I don't know how I would answer that either without knowing all of what they said."
Reporter's Transcript, page V-68, April 3, 1984.

Yagman, in spite of the lack of knowledge by his clients of what was said, continued to press this action even though, in a Motion for Award of Attorneys' Fees filed March 3, 1983 in the case of *Settles v. The City of Signal Hill*, CV 81-6437-FW, Yagman stated, "(3) *Most importantly, no person or body ever has said that Jerry Brown killed Settles*" (emphasis in original).

This Court recognizes that there may be occasions when an attorney must file a case without a full and complete grasp of the factual basis for the imposition of liability on a prospective defendant. Conspiracy and some fraud actions are examples of this type of action.

Defamation, however, is not such a case. The defamatory nature of an utterance or writing can be recognized immediately. The impact on the reputation of the individual defamed is likewise a rather simple matter to discern in advance of any filing of an action. The total lack of merit in considering the statements made as opinions, even if none of the many other reasons for lack of liability in defamation, had to be apparent to Yagman immediately. He paid no attention to this lack of merit. He proceeded to file in spite of all the indications that he had no case.

What must be concluded from a study of the file in this matter, and by the observations of this Court at trial, is that Yagman acted unreasonably and vexatiously in instituting and prosecuting this action against defendants. His bad faith and cavalier attitude is evidenced throughout the record of proceedings. Defendants, by reason of Yagman's conduct, were required to incur expenses in excess of $293,000.

Yagman's conduct from the outset was violative of the Rules and common sense. His filing of the lawsuit was violative of Rule 11, F.R.Civ.P. His unreasonable and vexatious conduct in the prosecution of the action from the onset multiplied the proceedings totally out of proportion, in violation of 28 U.S.C. § 1927. His total conduct calls for sanctions pursuant to Local Rule 27.1. It is difficult to conceive of a case more subject to sanctions upon an attorney than this one.

Defendants have only requested sanctions of $250,000, which takes well into account any previous sanctions paid by Yagman. Sanctions are imposed upon Stephen Yagman and his professional corporation, Yagman & Yagman, P.C., in the sum of $250,000.00. The imposition of sanctions on Yagman & Yagman, P.C., is for the reason that the action was commenced by that entity.

This Opinion shall be deemed to be the findings of fact and conclusions of law as permitted by Rule 52(a), Federal Rules of Civil Procedure.

DATED: June 20, 1984.

/s/ Manuel L. Real
MANUEL L. REAL
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 82-3268-R(Gx)

JERRY BROWN, *et al.*,
Plaintiffs,

vs.

MICHAEL BADEN, *et al.*,
Defendants.

[Filed April 16, 1984]

ORDER ON MOTION FOR DIRECTED VERDICT
(Rule 50, Fed. Rules Civ. Proc.)

The above-entitled matter came on regularly for trial by jury on April 3, 1984. Stephen Yagman and Marion R. Yagman of Yagman and Yagman appeared as counsel for plaintiffs Jerry Brown and Gerry Fleisher; Harvey A. Schneider, a member of Harvy A. Schneider, a Professional Law Corporation, appeared as counsel for defendant Sidney Weinberg, M.D., and Mark E. Beck, a member of the Law Office of Mark E. Beck, a Professional Corporation, appeared as counsel for defendant Michael Baden, M.D. Oral and documentary evidence was introduced on behalf of plaintiffs and defendants during plaintiffs' case-in-chief, following which the defendants moved for a directed verdict, pursuant to Rule 50 of the Federal Rules of Civil Procedure on the following grounds:

1. That all statements made by the defendants which are the subject of this action were absolutely privileged pursuant to California Civil Code § 47, subd. 2 (the judicial privilege).

2. That all statements made by the defendants which are the subject of this action constituted expressions of opinion, and not statements of fact.

3. That the plaintiffs failed to prove actual (constitutional) malice, i.e., that any statement made by either defendant was knowingly false or made with reckless disregard for the truth.

4. That no statement made by either defendant which is the subject of this action was "of and concerning" either plaintiff.

5. That all statements made by defendants which are the subject of this action related to a matter of significant public interest and were, therefore, privileged pursuant to the provisions of California Civil Code § 47, subd. 3, the plaintiffs having failed to prove malice.

6. That each plaintiff failed to prove he had a good professional reputation which was damaged by any statement made by either defendant.

7. That plaintiffs failed to prove they sustained actual or special damages.

8. That plaintiffs failed to prove that any statement made by either defendant which is the subject of this action was published in California.

9. That each plaintiff was defamation-proof.

The Court having considered the argument of counsel for defendants in support of their Motion for Directed Verdict, counsel for plaintiffs having declined to make an argument in opposition to the motion, and the Court being fully advised:

IT IS HEREBY ORDERED that defendants' Motion for Directed Verdict be, and the same hereby is, granted on the grounds set forth above, each and all.

DATED: April 16, 1984.

/s/ Manuel L. Real
MANUEL L. REAL
Chief United States District Judge

Presented by:

HARVEY A. SCHNEIDER
A Professional Law Corporation

By /s/ Harvey A. Schneider
HARVEY A. SCHNEIDER
Attorney for Defendant Weinberg

LAW OFFICE OF MARK E. BECK
A Professional Corporation

By /s/ Mark E. Beck
MARK E. BECK
Attorneys for Defendant Baden

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article II, Section 4 provides:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

The relevant sections of Title 28, United States Code provide:

§ 137. Division of business among district judges

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall

proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

§ 322. Judicial councils of circuits

(a) (1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit, consisting of—

(A) the chief judge of the circuit, who shall preside;

(B) that number of circuit judges fixed by majority vote of all such judges in regular active service; and

(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that—

(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparagraph shall be no less than two; and

(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with

this subparagraph shall be no less than three.

(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

(3) The number of circuit and district judges fixed in accordance with paragraphs (1) (B) and (1) (C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting of the council so constituted.

(4) Only circuit and district judges in regular active service shall serve as members of the council.

(5) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the semiannually reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d) (1) Each judicial council shall make all necessary and appropriate orders for the effective and

expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

(e) The judicial council of each circuit may appoint a circuit executive from among persons who shall be certified by the Board of Certification. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(1) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

(2) Administering the personnel system of the court of appeals of the circuit.

(3 Administering the budget of the court of appeals of the circuit.

(4) Maintaining a modern accounting system.

(5) Establishing and maintaining property control records and undertaking a space management program.

(6) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the Judicial Conference.

(7) Collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council, and the Administrative Office of the United States Courts.

(8) Representing the circuit as its liaison to the courts of the various States in which the circuit is located, the marshal's office, State and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(9) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(10) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit.

(f) The standards for certification as qualified to be a circuit executive shall be set by a Board of Certification. These standards shall take into ac-

count experience in administrative and executive positions, familiarity with court procedures, and special training. The Board of Certification shall consist of five members, three of whom shall be elected by the Judicial Conference of the United States, and at least one of these three shall be selected from among persons experienced in executive recruitment and selection. The additional two members shall be the Director of the Administrative Office of the United States Courts and the Director of the Federal Judicial Center. The members of the Board elected by the Judicial Conference shall each serve for three years except that upon appointment of the first members, one member shall serve for one year, one for two years, and one for three years. The Board shall consider all applicants who apply for certification, shall certify qualified applicants, shall maintain a roster of all persons certified, and shall publish the standards for certification. A person's name shall be removed from the roster after three years unless he is recertified. Three members of the Board shall constitute a quorum for purposes of fixing standards and for certifying applicants, but no action of the Board shall be taken unless three of the members are in agreement. The Director of the Administrative Office of the United States Courts shall provide staff assistance in support of the operation of the Board. Expenses of the Board of Certification shall be borne by the travel and miscellaneous expense funds appropriated to the Federal judiciary. Any member of the Board who is an officer or employee of the United States shall serve without compensation. Other members shall receive the daily equivalent of the rate provided for GS-18 of the General Schedule contained in section 5332 of title 5, United States Code, when actually engaged in service for the Board.

Each circuit executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level V of the Executive Schedule pay rates (5 U.S.C. 5316).

The circuit executive shall serve at the pleasure of the judicial council of the circuit.

The circuit executive may appoint, with the approval of the council, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

The circuit executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to civil service retirement), chapter 87 (relating to Federal employees' life insurance program), and chapter 89 (relating to Federal employees' health benefits program) of title 5, United States Code.

§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline

(a) Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

Any justice or judge of the United States desiring to retire under this section shall certify to the President his disability in writing.

Whenever an associate justice of the Supreme Court, a chief judge of a circuit or the chief judge of the Court of International Trade, desires to retire under this section, he shall furnish to the Presi-

dent a certificate of disability signed by the Chief Justice of the United States.

A circuit or district judge, desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his circuit.

A judge of the Court of International Trade desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his court.

Each justice or judge retiring under this section after serving ten years continuously or otherwise shall, during the remainder of his lifetime, receive the salary of the office. A justice or judge retiring under this section who has served less than ten years in all shall, during the remainder of his lifetime, receive one-half the salary of the office.

(b) Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit in the case of a circuit or district judge, or by the Chief Justice of the United States in the case of the Chief Judge of the Court of International Trade, or by the chief judge of his court in the case of a judge of the Court of International Trade, is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. Whenever any such additional judge is appointed, the vacancy subsequently caused by the death,

resignation, or retirement of the disabled judge shall not be filled. Any judge whose disability causes the appointment of an additional judge shall, for purpose of precedence, service [1] as chief judge, or temporary performance of the duties of that office, be treated as junior in commission to the other judges of the circuit, district, or court.

(c) (1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons may—

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly—

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council—

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title; and

(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7) (A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct—

(i) which might constitute one or more grounds for impeachment under acticle I of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8). Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it consid-

ers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of

proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that—

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing, and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any pro-

ceeding before a judicial council or the Judicial Conference under this subsection.

(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding unless—

(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(17) The United States Claims Court, the Court of International Trade, and the Court of Appeals

for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing

in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a

relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective juris-

dictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Supreme Court, U.S.
FILED
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 87-250

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MANUEL L. REAL, CHIEF JUDGE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,

Petitioner,

v.

STEPHEN YAGMAN,

Respondent,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI

MARK E. BECK
BECK & DE CORSO
A Professional Corporation
811 West Seventh Street
11th Floor
Los Angeles, California 90017
(213) 688-1198
Counsel of record for Respondent
Michael Baden

HARVEY A. SCHNEIDER
A PROFESSIONAL CORPORATION
5850 Canoga Avenue, 4th Floor
Woodland Hills, CA 91367
(818) 702-0204
Counsel of record for Respondent
Sidney Weinberg

CASE NO. 87-250

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MANUEL L. REAL, CHIEF JUDGE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,

Petitioner,

v.

STEPHEN YAGMAN,

Respondent,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARK E. BECK
BECK & DE CORSO
A Professional Corporation
811 West Seventh Street
11th Floor
Los Angeles, California 90017
(213) 688-1198
Counsel of record for Respondent
Michael Baden

HARVEY A. SCHNEIDER
A PROFESSIONAL CORPORATION
5850 Canoga Avenue, 4th Floor
Woodland Hills, CA 91367
(818) 702-0204
Counsel of record for Respondent
Sidney Weinberg

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ii

I. INTRODUCTION..... 1

II. STATEMENT OF REASONS..... 2

A. The Ninth Circuit's Re-assignment Of This Case Hinders The Policy Of Sanctioning Frivolous, Bad Faith Litigation..... 2

B. Reassignment Will Encourage Improper Attacks Upon Judges..... 4

C. Reassignment Deprives Injured Parties Of The Judge Best Able To Assess The Nature And Degree Of The Offending Attorney's Misconduct..... 6

III. CONCLUSION..... 7

TABLE OF AUTHORITIES

CASE PAGE

Roadway Express, Inc. v. Piper,
447 U.S. 752
100 S.Ct. 2455,
65 L.Ed.2d 488 (1980).....2

Koller By and Through Koller v.
Richardson-Merrell,
737 F.2d
1038 (D.C. Cir. 1984)
vacated and remanded sub nom.
Richardson-Merrell, Inc. v. Koller,
472 U.S. 424
105 S. Ct. 2757,
86 L.Ed.2d 340.....4, 5

Matter of Yagman,
796 F.2d 1165 (9th Cir.
1986).....8

RULES

Federal Rule of
Civil Procedure 11.....2

CASE NO. 87-250

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MANUEL L. REAL, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,

Petitioner,

v.

STEPHEN YAGMAN,

Respondent,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTION

Respondents (real parties in interest) Sidney Weinberg, M.D., and Michael Baden, M.D., join Petitioner in urging the Court to grant certiorari in this case. Respondents concur with the reasons set forth in the Petition, and offer the following additional reasons

for granting certiorari.

II.

STATEMENT OF REASONS

A. The Ninth Circuit's Reassignment Of This Case Hinders The Policy Of Sanctioning Frivolous, Bad Faith Litigation.

This Court has stated that sanctions are an appropriate method of punishing attorneys who vexatiously abuse the process of the courts. Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). Additionally, Congress modified Federal Rule of Civil Procedure 11 in 1983 to clarify the propriety, indeed the duty, of sanctioning frivolous, bad faith litigation. Nevertheless, the Ninth Circuit undercut this significant policy supporting the use of sanctions by ordering reassignment of a judge who

took seriously the misconduct of an obstreperous attorney and the court's duty to respond.

This Court must make a clear statement preserving the authority of judges to impose appropriate sanctions in these circumstances. Such a statement would be consistent with the policies already set forth by both Congress and this Court.

This Court will seldom encounter a case in which an attorney's misconduct is so well documented over such a prolonged period. This case therefore presents an ideal opportunity to identify types of conduct which federal practitioners must avoid and which the federal bench will not tolerate.

Given the heavy case load federal judges are currently managing, and the often staggering cost engendered by frivolous, bad faith litigation, this opportunity to address the power of

federal judges to sanction parties and their counsel is one which must not be allowed to pass.

B. Reassignment Will Encourage Improper Attacks Upon Judges.

Counsel of the sort who was sanctioned in this case should not be encouraged to bootstrap the transfer of a case by making slanderous attacks against judges who acted within their authority, but in a manner unwelcomed by counsel. If a judge can be removed from a case through no fault of his own, but due only to the contempt shown him or her by counsel:

> We will be opening a "Pandora's box" for countless baseless attacks upon a defenseless judiciary whose independence is essential to the preservation of this republic. To encourage requests for remands to another judge, would also encourage

> indirect judge shopping, and libelous or slanderous statements directed against both trial and appellate judges. (Emphasis in original.)

Koller By and Through Koller v. Richardson-Merrell, 737 F.2d 1038, 1069 (D.C. Cir. 1984) (Richey, J., concurring), vacated and remanded sub nom. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985).

This Court must send a message to all attorneys, particularly those who have no compunction about stepping outside the bounds of proper zealous advocacy, that the right and duty of federal judges to control the conduct of attorneys who appear before the court may not be undermined or circumvented by vicious attacks upon their integrity.

///

///

///

C. Reassignment Deprives Injured Parties Of The Judge Best Able To Assess The Nature And Degree Of The Offending Attorney's Misconduct.

This Court also should grant certiorari to avoid manifest unfairness to injured parties. The Ninth Circuit's reassignment order would serve as a dangerous precedent which removes from sanctions hearings the only judges properly familiar with an attorney's misconduct and with the pre-trial and trial records generally. Such removal precludes the most complete and accurate appraisal of the offending attorney's misconduct, thereby denying the injured parties a proper hearing upon their claims for sanctions.

Most importantly, the cold record of the trial transcript often cannot begin to do justice to the variety and severity of attorney misconduct made the subject of a sanctions motion.

Consideration of the tone of counsel's voice and the mannerisms which mark his courtroom behavior are crucial to a proper evaluation of sanctionable behavior. As a result, the trial judge is in a unique position to evaluate the egregious nature of attorney trial misconduct.

In situations, as here, where the Ninth Circuit itself has said it has no doubt the trial judge would be fair and impartial upon remand, it is particularly inappropriate to deprive the injured parties of the judge who is best equipped to rule upon their motion for sanctions.

II.

CONCLUSION

It is not unusual for a trial judge and counsel to become embroiled in disputes during the course of

litigation. This is particularly true where, as here, counsel baits and provokes the trial court through repeated misconduct and lack of preparation. However, if every case involving conflict between a trial judge and counsel warranted the removal of the judge because "the fragile appearance of justice has taken a beating," Matter of Yagman, 796 F.2d 1165, 1188 (9th Cir. 1986), the resulting waste of judicial resources and damage to the integrity of the judicial system would be considerable.

Moreover, there is something most unseemly about a circuit court, in effect, taking the side of an ill-mannered and undisciplined attorney in his dispute with a federal trial judge.

Based on the foregoing, it is requested that this Court grant the Petition for Certiorari. The standards for reassignment of judges must be

further defined, the duty of federal judges to use sanctions to control attorneys in federal court must be affirmed, and any notion that a judge can be removed from a case due to his justified response to attorney misconduct must be extinguished.

Dated: September 8, 1987

Respectfully submitted,

HARVEY A. SCHNEIDER
A PROFESSIONAL CORPORATION

MARK E. BECK
BECK & DE CORSO
A Professional Corporation

By _____
MARK E. BECK
Attorneys for Respondents
SIDNEY WEINBERG, M.D. and
MICHAEL BADEN, M.D.

CERTIFICATE OF MAILING

I hereby certify that on this date I have place in the United States mail, postage prepaid, a true copy of the above document addressed as follows:

Donald C. Smaltz, Esq.
Morgan, Lewis & Bockius
801 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90017

Frederick D. Friedman, Esq.
O'Neill & Lysaght
2115 Main Street
Santa Monica, CA 90405

Ramsey Clark, Esq.
113 University Place
New York, New York 10003

(continued on next page)

Stephen Yagman, Esq.
Yagman, & Yagman, P.C.
10880 Wilshire Blvd.
Suite 1900
Los Angeles, CA 90024

Dated: September 8, 1987

Respectfully submitted,

HARVEY A. SCHNEIDER
A PROFESSIONAL CORPORATION

MARK E. BECK
BECK & DE CORSO
A Professional Corporation

By _____
MARK E. BECK
Attorneys for Respondents
SIDNEY WEINBERG, M.D. and
MICHAEL BADEN, M.D.

No. 87-250 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

MANUEL L. REAL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Petitioner,

vs.

STEPHEN YAGMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

RAMSEY CLARK
Counsel of Record
LAWRENCE W. SCHILLING
PETER B. MEADOW
36 East 12th Street
New York, New York 10003
(212) 475-3232

BRIAN O'NEILL
FREDERICK D. FRIEDMAN
O'NEILL & LYSAGHT
A Partnership Including
Professional Corporations
100 Wilshire Boulevard, Suite 700
Santa Monica, California 90401
(213) 451-5700

STEPHEN YAGMAN
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
10880 Wilshire Boulevard, Suite 1900
Los Angeles, California 90024
(213) 475-4988

Attorneys for Respondent
Stephen Yagman

QUESTION PRESENTED

Where the Court of Appeals reversed the District Court's imposition of a $250,000 sanctions award against plaintiffs' attorney as "massive" and "not sound" in amount and as unauthorized by the statute and rules invoked by the District Court, remanded the case for reconsideration whether any sanctions were warranted under a proper exercise of sanctioning authority, and directed that on remand the case be reassigned to a new, randomly selected judge because this was necessary under the "unusual circumstances" of the case to preserve the appearance of justice, did the Court of Appeals, in directing this random reassignment, exceed the jurisdiction and power it possesses over appeals under 28 U.S.C. 2106, under the All Writs Act, 28 U.S.C. 1651(a), and in the exercise of its inherent supervisory authority.

TABLE OF CONTENTS

	Page
Ouestion Presented	i
Table of Authorities	ii
Statement of The Case	1
Argument	12
Conclusion	17

TABLE OF AUTHORITIES

Brown v. Baden, 815 F.2d 575 (9th Cir. 1987), 9,10,11

Calvaresi v. United States, 348 U.S. 961 (1955), 14

Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), 16

In Re Real, 107 S.Ct. 604 (1986), 7

Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986) rehearing denied, 803 F.2d 1085 (9th Cir. 1986), 3,4,5, 6

	Page
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976),	16
United States v. Baylin, 696 F.2d 1030, 1043 n. 30 (3rd Cir. 1982),	13
United States v. Ritter, 273 F.2d 30, 32 (10th Cir. 1959), cert denied, 362 U.S. 950 (1960),	13
United States v. Robin, 553 F.2d 8, 9 (2nd Cir. 1977),	12,14
United States v. Sears, Roebuck & Co., 785 F.2d 777 (9th Cir.), cert denied, 107 S.Ct. 93 (1986),	6,13,14

Statutes and Rules

Title 28, U.S.C.	
144	8,12
332 (d)(3)	16
445	7,12
1651 (a), All Writs Act	i,12
1927	2,4
2106	i,12
Rule 11, F.R.Civ.P.	3,4
Central District of California Local Rule 27.1	3,4

SUPREME COURT OF THE UNTED STATES

OCTOBER TERM, 1987

No. 87-250

MANUEL L. REAL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Petitioner,

vs.

STEPHEN YAGMAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This petition arose as a result of a civil diversity case in the Central District of California in which plaintiffs Jerry Brown and Gerry Fleischer sued defendants Sidney Weinberg and Michael Baden for defamation. Respondent herein, Stephen Yagman ("Yagman"), and his husband and wife law firm, Yagman &

Yagman, P.C., represented the plaintiffs.

The complaint was filed on July 1, 1982 and assigned to the Honorable Lawrence T. Lydick. By the trial date Judge Lydick had considered more than 250 separate pleadings and denied four separate motions for summary judgment filed by defendants. The case was reassigned on the eve of trial, March 14, 1984, without notice to plaintiffs, to petitioner herein, the Honorable Manuel L. Real, Chief Judge of the Central District of California.

After directing a verdict in defendants' favor at the close of plaintiffs' case, Judge Real suggested to defendants that they make a motion for sanctions. When defendants made the motion, Judge Real, on June 20, 1984, imposed sanctions on Yagman and his firm in the amount of $250,000, the full amount requested by defendants. (App. 60a-74a).*

---

* Citations to "App." are to the Appendix to the petition for a writ of certiorari herein.

Judge Real based the sanctions on Rule 11, F.R.Civ.P., 28 U.S.C. 1927, and Central District Local Rule 27.1. He based the dollar amount on claimed attorneys' fees of more than $293,000 and other expenses allegedly incurred by the defendants.

Yagman appealed. In Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986), App. 12a-55a, the Court of Appeals restated the rule that sanctions must be reasonable and rejected the district court's devastating sanctions as not complying with this rule. Matter of Yagman, supra, 796 F.2d at 1184, App. 46a-47a. The Court noted that Judge Real had made "no attempt to itemize and quantify the sanctions." Matter of Yagman, supra, 796 F.2d at 1185, App. 48a. Nor had the district court made any attempt "to scrutinize the $293,000 in fees and expenses that defendants claim to have incurred in fighting a lawsuit which they contend was frivolous from the start." Id. In addition,

the district court had failed to consider any misconduct on the part of defense counsel and had failed to take into account Yagman's ability to pay "such an immense sum." Id., App. 49a.

The Court of Appeals concluded that "the district court does not appear to have determined in any way whether the sanctions award complies with the reasonableness requirement." Id. To allow such a "massive" sanctions award to stand, the Court ruled, "would send shivers through the bar." Id. The Court also held that Judge Real had erred in applying Rule 11, F.R.Civ.P., 28 U.S.C. 1927 and Local Rule 27.1 in imposing sanctions. Id. at 1185-7, App. 49a-54a. The Court reversed the sanctions award and remanded.

The Court's remand was accompanied by the specific instruction "that this case be randomly reassigned" to a new district judge. Id. at 1188, App. 55a. The Court acknowledged that it was "hesitant to grant

this extraordinary relief" but stated that it was compelled to do so "to preserve the appearance of justice." As the Court observed in a spirit of moderation, "... the fragile appearance of justice has taken a beating." The Court added in its opinion which was rendered on August 13, 1986,

> "It is time to conclude the matter as quickly and as painlessly as possible. We feel this can best be accomplished by a new, randomly selected judge."

Id.

Judge Real did not cause the case to be randomly reassigned. Instead, after the decision he scheduled five separate court dates, September 19, 1986, October 20, 1986, November 17, 1986, January 5, 1987 and January 12, 1987, each with an in terrorem quality caused by uncertainty as to his purpose.

Appellees in the underlying civil case, Michael Baden and Sidney Weinberg, filed a petition for rehearing accompanied by a suggestion of appropriateness of rehearing en

banc. The petition specifically took issue with the Court of Appeals' determination that the case be randomly reassigned. By order dated November 6, 1986, the panel denied the petition and rejected the suggestion for rehearing en banc, noting that no judge of the full court had requested a vote on the suggestion for en banc rehearing. Matter of Yagman, 803 F.2d 1085 (9th Cir. 1986), App. 58a-59a.

At the hearing before Judge Real on November 17, 1986, for the stated purpose of spreading the judgment of the Court of Appeals on the record of the district court, Judge Real continued the hearing until January 1987 to await the decision of the Supreme Court on Judge Real's own petition for a writ of mandamus following the Court of Appeals' decision in United States v. Sears, Roebuck & Co., 785 F.2d 777 (9th Cir.), cert denied, 107 S.Ct. 93 (1986). The Court of Appeals' opinion in Sears had ordered that

case reassigned on remand from Judge Real to another district judge. Judge Real's petition challenged the power and authority of the Court of Appeals to order that reassignment. On December 1, 1986, the Supreme Court denied without opinion Judge Real's petition for mandamus, thus letting the reassignment order stand. In Re Real, 107 S.Ct. 604 (1986).

On January 12, 1987, Judge Real did not reassign the case randomly to another district judge as directed by the Court of Appeals' order, App. 56a-57a. Instead, he retained the case and filed and served on the parties a document styled "Order to Show Cause". App. 8a-9a. This Order to Show Cause directed the parties to file briefs addressing the Court of Appeals' authority to reassign the case. The order mandated that each party's brief address 11 stated issues, including the constitutional or statutory authority of the Court of Appeals in the assignment of cases in the district court;

whether 28 U.S.C. Sections 144 and 445 provide the exclusive method for reassignment of cases; and whether a district court was entitled to notice and a hearing before recusal from a case by the Court of Appeals. The issues he ordered the parties to brief included the precise issues he had briefed and presented as a litigant to the Supreme Court in his petition for a writ of mandamus in Sears several months earlier. Thus, instead of obeying a direct order of a higher court to cause the case to be randomly reassigned, Judge Real ordered the parties to submit briefs on the lawfulness of the higher court's order, though only a month before the Supreme Court had declined to review those very issues raised by him as a litigant.

Faced with this prospect, Yagman immediately filed a notice of appeal from the January 12 order accompanied by an emergency motion for a stay of the order. By order filed January 28, 1987, App. 10a-11a, the

Court of Appeals construed the appeal and the motion as a petition for a writ of mandamus to compel compliance with the Court's prior order of reassigment. The Court ordered responses to the petition to be filed within 21 days. Further proceedings in the district court were stayed pending a decision on the petition. Judge Real, through counsel, subsequently filed an opposition to the petition, as did appellees Weinberg and Baden.

On April 22, 1987, the Court of Appeals granted the writ of mandamus, directing enforcement of its previous order that the case be randomly reassigned. Brown v. Baden, 815 F.2d 575 (9th Cir. 1987), App. 1a-4a. The Court stated that there was "no doubt" as to its authority to reassign a case. Brown v. Baden, supra, 815 F.2d at 576, App. 3a. The Court observed that anarchy would prevail if a lower court did not follow decisions and mandates of a higher court. Id. The Court also cited the "long line of

cases" permitting a court of appeals to reassign cases in the exercise of the court's "inherent power to administer the system of appeals and remands." Id., App. 4a.

The Court then vacated Judge Real's Order to Show Cause, granted Yagman's petition and directed the clerk of the district court to randomly select another judge for the case in accordance with court rules. Id. at 577, App. 4a.

In a subsequent order filed June 26, 1987, Brown v. Baden, supra, 815 F.2d at 577, App. 5a-6a, the Court amended its earlier decision "to relieve the clerk of the district court of any obligation to randomly select another district judge for this case", ordering instead that the obligation to reassign the case "shall remain with Chief Judge Real as previously ordered." Brown v. Baden, supra, App. 6a.

The June 26 order also noted that Yagman had previously applied to have Judge Real

held in contempt for failure to reassign the case as directed by the Court almost a year earlier. The Court stated in this regard:

> "That application is hereby dismissed as premature in that Chief Judge Real has not exhausted the judicial remedies available to him and he may yet comply with this court's reassignment order and thereby purge himself of possible contempt."

Id., App. 6a.

Judge Real has now petitioned this Court for a writ of certiorari to review the Court of Appeals' decision granting the writ of mandamus requiring Judge Real to follow the Court's earlier order and reassign the case. Alternately, Judge Real seeks a writ of mandamus or prohibition directing the Court of Appeals to reverse its order of reassignment, Petition p.1. For the reasons set forth below, this petition should be denied.

ARGUMENT

Judge Real's primary argument as set forth in his petition is that an appellate court simply has no authority to order reassignment of a case "apart from circumstances justifying disqualification under Title 28 U.S.C. Sections 144 and 455." Petition p. 8. However, no case known to respondent, including the cases cited by Judge Real, has ever held, commented in passing or implied that an appellate court's reassignment power is so limited. All courts of appeal which have considered the matter have ruled that such reassignment power exists.

The courts have articulated different sources for the power to reassign cases in the absence of bias. Some courts rely on the general remand authority contained in 28 U.S.C. 2106. E.g., United States v. Robin, 553 F.2d 8, 9 (2nd Cir. 1977). Other courts have cited the All Writs Act, 28 U.S.C. 1651(a). E.g., United States v. Ritter, 273

F.2d 30, 32 (10th Cir. 1959), cert denied, 362 U.S. 950 (1960). Still other courts have found the reassignment power to be part of the court's inherent supervisory power. United States v. Baylin, 696 F.2d 1030, 1043 n. 30 (3rd Cir. 1982). The Ninth Circuit has found the power to reassign cases from all three sources. United States v. Sears, Roebuck & Co., Inc., supra, 785 F.2d at 779.

What the courts in all these cases are saying -- with one voice -- is that an appellate court's power to order reassignment of a particular case to a different trial judge is a necessary concomitant of appellate jurisdiction, inferable from the wording of the statutes governing appellate jurisdicion, necessary to the very existence of the appellate system itself. The power is so basic that, as Judge Real notes in his petition, some courts invoke it without discussion of its legal derivation. Indeed, the Supreme Court did just that in Calvaresi

v. United States, 348 U.S. 961 (1955), where the Court remanded a case "for retrial before a different judge," saying only that it was doing so "[i]n the interests of justice and in the exercise of the supervisory powers of this Court."

The relief is extraordinary and appellate courts ought to be, as the Court of Appeals here was, "hesitant to grant" it. App. 55a. For this reason the circuit courts have carefully established standards for determining when an order of reassignment is appropriate. In two leading cases, the Second Circuit and the Ninth Circuit have ruled that remand to a new judge is to be ordered only under "unusual circumstances." United States v. Sears, Roebuck & Co., inc., Supra, 785 F.2d at 780; United States v. Robin, supra, 553 F.2d at 10. Both courts evaluate the same three factors in determining whether reassignment is appropriate. Id.

Thus, Judge Real is wrong in stating in

his petition that there is no clear rule of law applicable to his conduct. Petition at pp. 7-11. The courts of appeals have spoken with remarkable unanimity and consistency. His tenacious attempt to retain jurisdiction in this case, delaying resolution of the issues which threaten the career of a zealous civil rights advocate for over a year, itself damages the fragile appearance of justice and requires reassignment.

There is a clear appellate power of reassignment on these facts with Judge Real's conduct falling within clear standards for its exercise. The power has been invoked infrequently and exercised prudently over the years. The facts in this case, where the draconian sanctions imposed would destroy most members of the bar, falls clearly within such standards.

If there remain areas of uncertainty either as to appellate courts' power of trial assignments, see, Chandler v. Judicial

Council of the Tenth Circuit, 398 U.S. 74 (1970), or as to the relative advisability of addressing judicial intransigence by direct, case-by-case review or by proceedings of the Judicial Council of the Circuit, see, Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976) (repeated unauthorized remand to state court of properly removed cases), see also, 28 U.S.C. 332(d)(3) ("Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.") they must be addressed another day in other cases. There is no need for this Court to review this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Ramsey Clark
Counsel of Record

Lawrence W. Schilling
Peter B. Meadow
36 East 12th Street
New York, N.Y. 10003
(212)475-3232

Brian O'Neill
Frederick D. Friedman
O'Neill & Lysaght
100 Wilshire Boulevard
Suite 700
Santa Monica, CA 90401
(212)451-5700

Stephen Yagman
Marion R. Yagman
Yagman & Yagman, P.C.
10880 Wilshire Boulevard
Suite 1900
Los Angeles, CA 90024
(213)475-4988

October 30, 1987

Supreme Court, U.S.
FILED
NOV 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MANUEL L. REAL, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Petitioner,

v.

STEPHEN YAGMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

JOSEPH A. BALL
BALL, HUNT, HART, BROWN & BAERWITZ
211 East Ocean Boulevard
Long Beach, CA 90802
(213) 435-5631

DONALD C. SMALTZ
(Counsel of Record)
LEIGHTON M. ANDERSON
ROBERT B. MILLER
PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90017
(213) 612-2500

Attorneys for Petitioner Manuel L. Real, Chief Judge, United States District Court for the Central District of California

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE COURTS SHOULD NOT CREATE A "REASSIGNMENT" POWER THAT NULLIFIES THE CAREFUL BALANCE EMBODIED IN THE DISQUALIFICATION STATUTES	3
III. THE APPEARANCE OF JUSTICE IS INJURED, RATHER THAN AIDED, BY THE STANDARDLESS EXERCISE OF REASSIGNMENT POWER	6
IV. THE DIFFERENCES AMONG THE CIRCUIT COURT OPINIONS SHOW THE NEED FOR INTERVENTION BY THIS COURT	8
V. CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 5
Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954), *rev'd*, 348 U.S. 961 (1955) 8-9
Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1980) 7-8
Crawford Fitting Co. v. J.T. Gibbons, Inc., —— U.S. ——, 107 S. Ct. 2494 (1987) 5
Davis v. Board of School Comm'rs, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 4
Hamblen v. County of Los Angeles, 803 F.2d 462 (9th Cir. 1986) 3
In re Martin-Trigona, 573 F. Supp. 1237 (D. Conn. 1983), *appeal dismissed*, 770 F.2d 157 (2d Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986) 4
Koller By and Through Koller v. Richardson-Merrell, Inc., 737 F.2d 1038 (D.C. Cir. 1984), *vacated and remanded sub nom.* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) 6
Tomer v. Gates, 811 F.2d 1240 (9th Cir. 1987) 3
Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710 (7th Cir. 1986) 4
United States v. Grinnell Corp., 384 U.S. 563 (1966) 4

Statutes:

28 U.S.C. § 144 3
28 U.S.C. § 455 3, 4
28 U.S.C. § 1651(a) 8
28 U.S.C. § 2106 8

Other:

Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-250

MANUEL L. REAL, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Petitioner,

v.

STEPHEN YAGMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

I. INTRODUCTION.

Respondent's brief in opposition completely misses the point of the petition for certiorari. Indeed, the brief both mischaracterizes the record and effectively misstates the question presented. This Court is *not* being asked to determine whether the award of defendants' attorneys' fees was a proper response to an abuse of the judicial process, or whether Yagman is only a "zealous civil rights advocate." (Respondent's Brief at 15). That claim is nei-

ther the fact nor the issue. Rather, the issue presented is whether the court of appeals had the power, after finding every material fact in support of Judge Real's continued qualification to sit as the judge in the case, to remove him from the case in the exercise of an unfettered discretion. It is this purported distinction between statutory disqualification and constructive disqualification (reassignment) that merits this Court's scrutiny.

To paraphrase the words of the opinion below, the recusal of a district judge in a case in which he has been found to have acted fairly can only "send shivers through the [judiciary]." (App. 49a). Such a procedure dissuades even the fairest and most impartial judge from making difficult decisions as best he sees them, for fear of removal at the unlimited discretion of an appellate panel. The end result is contrary to law, judicial policy, and the checks and balances that are fundamental to the American system of government.

While Yagman's version of this litigation is irrelevant to these observations, the Court should not be misled by the rhetoric in Yagman's brief, which neither fairly nor accurately characterizes the facts of the case.* In attempting to imply that the sanctions award constituted some alleged punishment for his self-described civil rights advocacy, Yagman's brief omits to mention *any* of the facts in the record that demonstrate the falsity of that assertion, including the facts on which the court below expressly relied to support its findings that Judge Real acted fairly in the matter. (*E.g.*, App. 41a). The truth is that any number of judges, including appellate judges, have had occasion to criticize instances of seri-

---

* For example, the assertion that the underlying defamation action was reassigned to Judge Real "on the eve of trial . . . without notice to plaintiffs" is apparently intended to suggest some impropriety. In so doing, Yagman simply omits any mention of the fact that the reassignment of Judge Lydick's entire calendar was necessitated by a severe illness. (App. 30a).

ous misconduct by Yagman, which have never seen within the accepted standards of the civil rights bar. *See Hamblen v. County of Los Angeles*, 803 F.2d 462, 464-65 (9th Cir. 1986) (Nelson, Hall, and Kozinski, J.J.) (attorney's fees and double costs on appeal to be paid by Yagman and his firm; "we take this opportunity to advise Mr. Yagman that continued failure to abide by [Ninth Circuit rules] may result in formal disciplinary proceedings"); *Tomer v. Gates*, 811 F.2d 1240, 1242-43 9th Cir. 1987) (Kennedy, O'Scannlain, and Wilkins, J.J.) ("Mr. Yagman has previously been admonished by this court," and failure to withdraw knowingly meritless argument was "unbecoming a member of the bar of this court"). If pointed criticism of Yagman's misconduct were a sufficient basis on which to disqualify a judge—and nothing more was ever found in this case—many judges other than petitioner would have to be recused from cases in which Yagman may appear.

For these reasons, and for the reasons stated below, Yagman's opposition fails to present any persuasive basis for the denial of certiorari. In contrast, the questions presented by the petition raise substantial issues of federal court administration, issues that require this Court's attention.

II. THE COURTS SHOULD NOT CREATE A "REASSIGNMENT" POWER THAT NULLIFIES THE CAREFUL BALANCE EMBODIED IN THE DISQUALIFICATION STATUTES.

Congress has specifically addressed the issue of judicial disqualification in two statutes, each of which sets forth, with care and precision, the grounds on which a federal district judge may be disqualified from hearing a particular case. 28 U.S.C. §§ 144, 455. Judicial decisions have further defined and qualified these statutory grounds. For example, it is clear that in order to justify disqualification under Section 144, the bias or prejudice exhibited by a judge "must stem from an extrajudicial

source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *see, e.g., Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1051-52 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (inquiry must focus on bias or prejudice against a party, rather than counsel). Similarly, Section 455 requires an objective test of reasonableness, so that recusal is not required in response to spurious charges or incomplete evidence. *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716 (7th Cir. 1986); *In re Martin-Trigona*, 573 F. Supp. 1237 (D. Conn. 1983), *appeal dismissed*, 770 F.2d 159 (2d Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986) ("appearance of partiality" test is one of reasonableness, and does not require recusal in response to spurious charges).

Various courts of appeals have sought to avoid these carefully drawn and limited grounds for disqualification by relying on the purported right to reassign cases at the time of remand, a procedure whose draconian effect is fully equal to that of disqualification itself. However, no court has successfully articulated any reasonable basis to support the existence of this presumed power, and indeed no two courts have been able to agree on its origin, purpose, or scope. The result has been a hodgepodge of artificial rationales, all aimed at justifying the existence of an "inherent power" for which no statutory authority exists, and which flies in the face of the criteria established by Congress for disqualifying judges.

Nowhere is the pernicious effect of this ad hoc improvisation more clearly evident than in the present case. In some of the earlier reassignment cases, there was at least some hint of conduct that might have justified disqualification under the statutory criteria, if such an inquiry had been pursued. In the present case, how-

ever, the panel expressly found that it would *not* be authorized under constitutional or statutory standards to take Judge Real off the case, but nevertheless directed that Judge Real be removed. Under the rationale of this decision, any appellate court may remove a district judge on any given day, providing that two panel members conclude that their action can be explained under the rubric, "appearance of justice." *No* standard can be synthesized from the cases, *no* quantum of evidence is needed, *no* motion, notice, or opportunity to be heard is provided, and *nothing* in the way of objective requirements has been clearly articulated at any time.

This sad and truly remarkable state of affairs would have been avoided had the courts of appeals, including the panel below, been willing to accept and abide by the standards set down by Congress for disqualifying judges. Instead, these courts have arrogated to themselves an "inherent power" of removal that they can neither adequately support nor define, and in doing so have casually ignored congressional mandates and exceeded their own lawful power. Specific statutory enactments should not be avoided or nullified by judicial "interpretation" of general grants of authority, where there is no clear legislative authorization to do so. *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, —— U.S. ——, 107 S. Ct. 2494, 2499 (1987); *see also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (in absence of a constitutional basis for disqualification, judicial qualification issues involving bias, interest, or other policy would seem to be matters of legislative discretion). Congress having adopted standards and procedures on the subject of judicial recusal, appellate panels should not—and should not be permitted to—set them aside in promoting their own vague notions of an "appearance of justice."

III. THE APPEARANCE OF JUSTICE IS INJURED, RATHER THAN AIDED, BY THE STANDARDLESS EXERCISE OF REASSIGNMENT POWER.

The growing tendency to order reassignments is inconsistent with sound judicial policy. Although the panel below purported to be motivated by its view of "the appearance of justice," the fact is that the appearance—and reality—of justice are instead being harmed by reassignment practices.

Consider first the effect of such orders on public perceptions. When a reassignment is divorced from any issue of a disqualifying relationship to the case, the public naturally concludes that such an "unusual" step reflects serious criticism of the district judge. Those perceptions are scarcely erased by pious disclaimers in the opinion accompanying the reassignment order, and necessarily engender doubts concerning the judge's handling of other cases, while creating the impression of a "feud" between the district judge and the court of appeals. None of these effects is beneficial to the federal court system as a whole.

In addition, the exercise of the purported power of reassignment encourages a new and particularly objectionable type of "forum shopping." Here, Yagman was able to achieve his desired result—a new judge—through a series of published newspaper interviews, including statements that commented insultingly on Judge Real's mental competence. Such a situation was foreseen by Judge Richey in *Koller By and Through Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1069 (D.C. Cir. 1984) (Richey, J., concurring), *vacated and remanded sub nom. Richard-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), when he warned that reassignment opens "[a] 'Pandora's Box' for countless, baseless attacks upon a defenseless judiciary . . . ."

In expressing concern with the "chilling" impact of sanctions awards, the court below unaccountably failed to show a similar solicitude for the effect of reassignment orders. Such practices must inevitably "chill" the independent exercise of judicial discretion in the district courts. Writing on the topic of judicial independence, Judge Irving Kaufman observed that such independence must be protected from encroachments by other judges, as well as from the legislative or executive branches of government. Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 690 (1979). Judge Kaufman concluded that a judge must be assured

> that the only indignity he may suffer for error is reversal. *In short, he must be certain that disagreeable views will not lead to personal punishment.*

Id. at 690 (emphasis added).

Reassignment imposes just such a personal punishment, and a stigma that is not carried by mere reversal. The potential threat of a reassignment thus interferes with the normal exercise of discretionary authority, as a trial judge must now consider whether his or her decisions may be sufficiently objectionable to any given appellate panel that it may choose to remove the judge from the case. As Justice Douglas observed more than 16 years ago, in dissenting from the decision not to hear the merits of Judge Chandler's appeal from an "administrative disqualification" by the judicial council,

> The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible . . . and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like . . . .

> *These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good . . . .*

Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting) (emphasis added).

In this case, the appellate panel expressly refused to consider any of the above considerations in opposition to its reassignment decision. (App. 3a-4a). Such considerations, however, clearly do warrant review by this Court.

IV. THE DIFFERENCES AMONG THE CIRCUIT COURT OPINIONS SHOW THE NEED FOR INTERVENTION BY THIS COURT.

Although the opposition asserts that the circuit court opinions speak "with one voice," Respondent's Brief at 13. this conclusion is belied by the cases cited. *Id.* at 12-13. In substance, Yagman admits that the courts of appeals have adopted conflicting theories in support of their desired end result, variously purporting to find the power within Section 1651(a) or Section 2106 of Title 28, or within generalized notions of "inherent," "implied," or "supervisory" power. Moreover, Yagman's opposition is silent with respect to the widely differing descriptions of the scope of the power as stated by the different circuits in reassignment cases.

In truth, the courts of appeals appear to be united *only* in the belief that if a reassignment power does not exist, it should be created! No two courts seem to agree, however, on the origin, purpose, or scope of the presumed power. Under these circumstances, the purported "unanimity" among the circuits is not a basis on which to decline review here.

Yagman also cannot take comfort from *Calvaresi v. United States*, 348 U.S. 961 (1955). (Respondent's Brief at 15-16.) As previously observed, Petition at 9, this

Court's ruling in *Calvaresi* must be read in context with the issue of judicial disqualification presented in that case under 28 U.S.C. § 144. *Calvaresi v. United States*, 216 F.2d 891, 900 (10th Cir. 1954), *rev'd*, 348 U.S. 961 (1955).

The simple fact is that this Court has never spoken to the questions presented by the petition. In the absence of any express authority, reliance by the courts of appeals on their own prior cases has the district appearance of "bootstrap" logic. Since the trend toward increasingly frequent reassignments is presently unchecked by any limiting factors, this Court's intervention is required.

V. CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH A. BALL
BALL, HUNT, HART, BROWN & BAERWITZ
211 East Ocean Boulevard
Long Beach, CA 90802
(213) 435-5631

DONALD C. SMALTZ
(Counsel of Record)
LEIGHTON M. ANDERSON
ROBERT B. MILLER
PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90017
(213) 612-2500

Attorneys for Petitioner Manuel L. Real, Chief Judge, United States District Court for the Central District of California

November 17, 1987